NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

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PREFACE.

As for many years previously, the discussions on "Situations in international law" at the Naval War College in 1912 were conducted by Prof. George Grafton Wilson, LL. D., professor of international law at Harvard University, associé de l'Institut de Droit International, and lecturer on international law at the Naval War College.

The situations all deal with points of international law of present general interest, but upon which practice is not well settled and defined.

In these discussions the learning of an international lawyer is brought into contact with the experience of naval officers who look at the subjects under consideration from the practical viewpoint of their own profession in the execution of their duties under the law. The combination gives undoubted weight to the conclusions reached.

In the belief that the solutions and the notes upon them will prove of general interest to naval officers, the War College annually requests their publication as a matter of information for the Navy.

During the past year a general index has been published which covers the work of the Naval War College upon international law for the years 1901–1910, inclusive. As stated in the preface to the General Index, in using these volumes it must be borne in mind that many of the situations discussed in the earlier volumes have been settled by The Hague and other subsequent conventions.

Officers are requested to send to the college statements of international-law situations which promise to be interesting as subjects for future discussion at the War

College, having specially in view matters which are likely to be advanced at the next Hague conference, as those upon which doctrine is developing and opinion is divergent.

W. L. Rodgers,
Captain, United States Navy,
President Naval War College.

United States Naval War College,
Newport, R. I., August 9, 1912.

TABLE OF CONTENTS.

International Law Situations.

WITH SOLUTIONS AND NOTES.

Situation I.

MERCHANT VESSELS AND INSURGENTS.

There is an insurrection in State X and the "free party" is attempting to overthrow by force the established government of State X. The "free party" has not been recognized as belligerent.

(*a*) An armed vessel of the "free party" is about to visit and search a United States merchant vessel on the high sea when a United States cruiser comes near. The master of the merchant vessel asks the United States commander for protection from visit and search.

(*b*) During the same insurrection a merchant vessel of the United States is about to enter a port which the insurgents have declared blockaded. The merchant vessel is seized within 3 miles of the coast of the insurgents at the line of blockade and while being taken into an insurgent port is met within 3 miles of the coast of State X by a United States cruiser. The master of the merchant vessel requests the commander of the United States cruiser to intervene to procure the release of his vessel.

(*c*) A merchant vessel of the United States is anchored in a harbor of State X and has on board some war material. The "free party" is about to take this war material by force. The master of the merchant vessel appeals to the commander of the United States cruiser for protection.

What action should the commander take in each case?

SOLUTION.

(*a*) The commander of the cruiser of the United States should if possible afford the merchant vessel the necessary protection from visit and search.

(*b*) If the only reason for the seizure of the merchant vessel is that it was about to enter a port which the insurgents have declared blockaded, the commander should grant the master's request, though the commander might require that the merchant vessel proceed to some other port.

(*c*) The commander of the cruiser of the United States should inform the master of the merchant vessel that, while he would endeavor to prevent wanton seizure of his cargo, he would not interfere with proper action which the insurgents might take to prevent the war material from reaching their opponents.

NOTES.

General.—The Government of the United States has been forced to give attention to the problems arising from what has come to be termed a state of insurrection. The many uprisings in the States of Central and South America and the recent disturbed conditions in Mexico and China in 1911 and 1912 afford examples of the complications which may arise.

In time of insurrection there may be ample reason why a state of belligerency should not be recognized. The recognition of belligerency would place the party recognized and the established State upon the same plane as regards the rights of war. This might be of great advantage as regards the party desiring to overthrow or to break away from the established State. Such recognition might be a decided disadvantage to the established State. As the established State has the power to indicate its will in regard to the recognition of the belligerency of its revolting subjects by itself acknowledging their belligerency, it is natural that foreign States should refrain from such recognition unless there be special reason demanding action. At the same time interests of a foreign State and the rights of its subjects may be involved to such a degree as to make necessary some cognizance of the disturbed conditions. As many existing States have come into being through revolutions which have overthrown previously existing Governments, it can not be anticipated that such movements will be disregarded or

will be entirely disapproved. The United States Supreme Court has therefore pointed out that in order that injustice may not be done to any party, there may be a necessity which will compel a State to acknowledge that there exists a war de facto while not recognizing any state of war de jure. (The *Three Friends*, 166 U S. Sup. Ct. Repts., p. 1.) If, therefore, there exist in fact hostilities of the nature of war, it will be necessary for foreign States to accommodate their action to such a condition. If the established State is dissatisfied with the conduct of foreign States, there is always in its competence the power to recognize the revolting party as belligerent. The revolting party naturally desires the exercise of many war powers. The established State often claims that every act of the revolting party is an act of outlawry and should be punished by the State injured. If the party in revolt is successful, its acts may, however, be regarded as legal from the beginning.

From the recognition of the facts which accompany revolutionary movements, and in an attempt to adapt State action to the facts, there has grown up since the latter years of the nineteenth century a somewhat well-established body of precedent and practice, which has been called the law of insurgency. The law upon all phases of insurrectionary conflict is not clear, and many new situations have arisen for which precedent does not exist. There has been an attempt, however, to make clear, so far as possible, the rights of all parties during the period when an armed and organized force is struggling for political ends and before belligerency has been recognized.

Why important for United States.—History shows that a large number of insurrectionary movements have taken place on the Western Hemisphere, in the countries to the south of the United States. Geographical proximity has necessarily brought the United States into contact with these movements. American precedents are therefore most numerous. The events of the twentieth century seem to indicate that insurrectionary movements

are not at an end and that new problems may continually arise.

Development of acknowledgment in United States.— It is evident from such cases that the parent State may prefer to admit the existence of an insurrection while not acknowledging the existence of belligerency. Policy may also influence a foreign State to prefer to admit the existence of an insurrection rather than to recognize belligerency. President McKinley, in his message of December 6, 1897, thus summarizes the matter as regards Cuba:

> Turning to the practical aspects of a recognition of belligerency and reviewing its inconveniences and positive dangers, still further pertinent considerations appear. In the code of nations there is no such thing as a naked recognition of belligerency unaccompanied by the assumption of international neutrality. Such recognition without more will not confer upon either party to a domestic conflict a status not therefore actually possessed or affect the relation of either party to other States. The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the de facto condition of belligerency as its motive. It announces a domestic law of neutrality in the declaring State. It assumes the international obligations of a neutral in the presence of a public state of war. It warns all the citizens and others within the jurisdiction of the proclaimant that they violate those rigorous obligations at their own peril and can not expect to be shielded from the consequences. The rights of visit and search on the seas and seizure of vessels and cargoes and contraband of war and good prize under admiralty law must under international law be admitted as a legitimate consequence of a proclamation of belligerency. While according to the equal belligerent rights defined by public law to each party in our ports disfavors would be imposed on both, which while nominally equal would weigh heavily in behalf of Spain herself. Possessing a navy and controlling the ports of Cuba her maritime rights could be asserted not only for the military investment of the island but up to the margin of our own territorial waters, and a condition of things would exist for which the Cubans within their own domain could not hope to create a parallel; while its creation through aid or sympathy from within our domain would be even more impossible than now, with the additional obligations of international neutrality we would perforce assume.

Or, as summarized by Prof. John Bassett Moore at that time:

> Moreover, the Cuban insurgents can at the present time purchase arms and munitions of war; they and their friends and

sympathizers can go and come, unarmed and unorganized, to take part in the conflict; they can sell their securities to anyone who will buy them. More than this they could not do, if their belligerency were recognized, unless they had ships on the ocean. They could neither employ persons in the United States to serve in their forces, nor fit out and arm vessels in our ports, nor set on foot hostile expeditions from our territory. On the other hand, Spain would be immediately invested by international law, as well as by the treaty of 1795, with the international rights of belligerency, which she has so far not claimed, including the right of visitation and search on the high seas, and the capture and condemnation of our vessels for violations of neutrality. It would enable Spain practically to put an end to the transportation of munitions of war for the insurgents. It would place under Spanish supervision all that vast commerce which passes through the waters adjacent to Cuba. (21 Forum, 297.)

In other words, a foreign State which recognizes the belligerency of a party to a domestic conflict thereby changes the status of the parties concerned, giving to the parties in the conflict a war status with its obligations and duties and assuming for itself the rights and obligations of neutrality. Prior to such recognition, if the parent State does not recognize the existence of war, the foreign State is largely judge of its relations to and conduct toward the parties to the domestic conflict. There may be political, commercial, geographical, or other conditions which make it inexpedient for a foreign State to recognize an insurgent party as a belligerent.

It is evident that there may be many reasons why a foreign State would be disinclined to recognize insurgents as belligerents, while at the same time the foreign States might be obliged to take cognizance of the existence of the insurrection. It is the fact that this status of insurrection brings new obligations to States and in some cases advantages.

There may also be reasons which make the parent State reluctant to recognize its insurgent subjects as belligerents, thus giving them full war status at home and abroad. Sometimes the parent State has endeavored before any recognition of belligerency to prescribe the attitude of foreign States toward its rebellious subjects. This has been a common procedure on the part of the

States where revolutions have been frequent. Many questions were raised in 1885 during the insurrection in the United States of Colombia. The President of Colombia decreed:

> That as the vessels of the opposing party in the port of Cartagena were flying the Colombian flag, it was in violation of right and placed that party beyond the pale of international law.

The United States refused to recognize the validity of the decree as affecting the relations of its officers to the insurgent party, and Great Britain took a similar stand. Hall has well said:

> It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question.

Action of the United States, 1912.—The United States by a formal act of Congress and by a presidential proclamation in accordance therewith in 1912 gave a more definite status to a condition of insurrection.

JOINT RESOLUTION To amend the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States, approved April twenty-second, eighteen hundred and ninety-eight, be, and hereby is, amended to read as follows:

"That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or Congress.

"SEC. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

Approved, March 14, 1912.

A proclamation by the President was immediately issued in accordance with the above resolution.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA—A PROCLAMATION.

Whereas a join resolution of Congress, approved March 14, 1912, reads and provides as follows: "That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress";

And whereas it is provided by section 2 of the said joint resolution, "That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both":

Now, therefore, I, William Howard Taft, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that there exist in Mexico such conditions of domestic violence promoted by the use of arms or munitions of war procured from the United States as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Mexico, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted. And I do hereby enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fourteenth day of March in the year of our Lord one thousand nine-hundred and twelve and of the independence of the United States of America the one hundred and thirty-sixth.

[SEAL.] WM. H. TAFT.

By the President:

HUNTINGTON WILSON,

Acting Secretary of State.

Consideration at Naval War College.—The Naval War College has from time to time given attention to the subject of insurgency. Lectures upon the general subject of insurgency were given by the present lecturer at the conference of 1900. Prof. John Bassett Moore discussed "Insurgents and contraband" as Situation V in 1901. The present lecturer considered "Interference by insurgents with commerce" as Situation VII in 1902; "Insurgency—(*a*) Asylum for insurgent troops on war vessels; (*b*) Seizure of United States merchant vessel by insurgents; (*c*) Transport service of United States merchant vessel in time of insurrection; (*d*) Return, during its continuance, of foreigners implicated in insurrection" as Situation III in 1904; and "Insurgency and commerce" as Situation VII in 1907.

Insurgents as pirates.—While insurrections in the States to the south of the United States have given rise to many questions in regard to the rights of vessels of the insurrectionary party, frequent requests of the established Government that such vessels be treated as pirates have not met with a favorable response from the United States. The statement of Secretary Fish in 1869 in regard to Haitian insurgents is typical.

> I acknowledge the receipt of your dispatch (No. 13) of the 13th ultimo, in which you inclose a copy of a note addressed by the secretary for foreign affairs of Haiti to the several members of the diplomatic corps accredited to his Government and relating to the armed steamers formerly called the *Quaker City* and the *Florida* now in the service of insurgents against the Government of Haiti. The secretary for foreign affairs, after reciting the fact that those insurgents have not been recognized by this or any other Government as entitled to belligerent rights, declares that the vessels which form the subject of his communication can not be considered according to the spirit of international maritime law otherwise than real pirates, which it is the duty of every regular navigator to pursue for the purpose of sinking or capturing them. He further states it to be an object of his communication to obtain from each one of the vessels of the respective nations to whose representatives it was addressed an adequate and efficacious cooperation in maintaining for the marine of the civilized world the security of the seas and to guarantee the protection of private property.

The good understanding which this Government earnestly desires to maintain with that of Haiti requires that this communication should receive a frank and explicit reply.

You will, therefore, say to the secretary for foreign affairs:

1. That we do not dispute the right of the Government of Haiti to treat the officers and crew of the *Quaker City* and the *Florida* (vessels in the service of insurgents against Haiti) as pirates for all intents and purposes. How they are to be regarded by their own legitimate Government is a question of municipal law, into which we have no occasion, if we had the right, to enter.

2. That this Government is not aware of any reason which would require or justify it in looking upon the vessels named in a different light from any other vessels employed in the service of the insurgents.

3. That regarding them simply as armed cruisers of insurgents not yet acknowledged by this Government to have attained belligerent rights, it is competent to the United States to deny and resist the exercise by those vessels or any other agents of the rebellion of the privileges which attend maritime war, in respect to our citizens or their property entitled to our protection. We may or may not, at our option, as justice and policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain but to capture and destroy jure belli. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this Government. They will not tolerate the search or stopping by cruisers in the rebel service of vessels of the United States, nor any other act which is only privileged by recognized belligerency.

4. While asserting the right to capture and destroy the vessels in question, and others of similar character, if any aggression upon persons or property entitled to the protection of this Government shall recommend such action, we can not admit the existence of any obligation to do so in the interest of Haiti or of the general security of commerce.

No facts have been presented to this Government to create a belief that the operations of the vessels in question have been with a view to plunder or had any other than a political object. That object is hostile to a Government with which the United States have maintained a friendship that it requires no fresh manifestation to evince. We deem it most decorous to leave it to that Government to deal with the hostile vessels as it

may find expedient, reserving the consideration of our action in respect to them till some offense, actual or apprehended, to the United States shall render it imperative.

You may read this dispatch to the secretary of foreign affairs and leave a copy of it with him if he desires it. (2 Moore, International Law Digest, p. 1085.)

In Situation III (*b*) of 1904 (International Law Situations, Naval War College, 1904, p. 35) the question of treatment of insurgents as pirates was discussed. The situation under consideration in 1904 was as follows:

SITUATION III (*b*).

There is an insurrection in State X.

(*b*) The insurgents seize the *Robin*, a United States merchant vessel in the harbor, and, promising to recompense the owners, sail away with the vessel. The owners request the commander of the United States war vessel to recover the *Robin* in case he meets the vessel. The commander meets the *Robin* on the high sea.

What, if anything, should the commander do?

The solution offered and supported by reference to precedents was:

SOLUTION.

The commander of the United States war vessel is justified in using such force as is necessary to recover the vessel which has been seized by the insurgents.

It was shown that piracy in the sense of international law is an act implying an *animus furandi*, an act undertaken with the purpose of robbery and usually accompanied by violence, and not a political act aimed at a particular State or at the citizens of a particular State.

The situation proposed as III (*b*) in 1904 involved a merchant vessel which had been taken by the insurgents from the American owners. The solution justified an American commander in using force to recover the vessel when met on the high sea.

Status of the "free party."—A party organized for political ends and in armed hostility against an established Government ceases to be a mob and becomes an insurrectionary body. The existence of such a status may, and sometimes must, be admitted. President Cleveland, on June 12, 1895, announced by formal proclamation that the island of Cuba was the "seat of serious civil

disturbances accompanied by armed resistance to the authority of the established Government of Spain." In his message of December 2, 1895, he mentions the status as that of an "insurrection." The Supreme Court in various decisions has since that time recognized "the distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense," regarding a body of men "as associated together in a common political enterprise and carrying on hostilities against the parent country" as insurgents. (The *Three Friends*, 166 U. S. Sup. Ct. Repts., p. 1.)

The use of the word "recognition" with both insurgency and belligerency may be misleading, The recognition of belligerency is an act of a State which may have other grounds than the simple existence of a disturbed condition and may be delayed or hastened by political or other reasons. The recognition of belligerency gives an international status to the belligerents. Recognition of belligerency in general gives to the recognized belligerent, so far as the recognizing State is concerned, the same war rights as are possessed by the established State.

Insurrection implies the existence of war in the material sense. It may be necessary for a State to inform its citizens of the existence of this condition by simply announcing the fact. The nature of the act is rather one of admitting a fact in regard to which there is abundant evidence than the recognition of a status in regard to which there may be doubt and which brings new obligations upon the recognizing State. It would seem expedient that the difference should be indicated as perhaps by the use of the phraseology, "recognition of belligerency" and "admission of insurgency." Such a distinction would be consistent with the argument of the Supreme Court in the case cited above in which it is said of the President's proclamations:

> We are thus judicially informed of the existence of an actual conflict of arms in resistance of a Government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place.

Secretary Hay, in 1899, admitted the necessity which might arise for dealing with insurgents in a letter to Mr. Bridgman, Minister to Bolivia:

> You will understand that you can have no diplomatic relations with the insurgents implying their recognition by the United States as the legitimate Government of Bolivia, but that, short of such recognition, you are entitled to deal with them as the responsible parties in local possession, to the extent of demanding for yourself and for all Americans within reach of insurgent authority within the territory controlled by them fullest protection for life and property. (U. S. Foreign Relations, 1899, p. 105.)

The "free party" might, by the statement of the situation, be regarded as insurgents, and insurgency might be admitted to exist in the neighborhood of the port.

Situation I (*a*).—In the situation now under consideration an armed vessel of the "free party," an insurgent party of State X, is about to visit and search a merchant vessel of the United States on the high sea, when a United States cruiser comes near, and the master of the merchant vessel asks the commander of the United States cruiser for protection from visit and search.

Visit and search.—Visit and search, as usually understood, is a form of interference with merchant vessels on the high sea or in belligerent waters, which is tolerated in time of war, in order that a belligerent may learn the nationality and relation of the vessels visited to the war.

Visit and search does not, like the seizure discussed in Situation III (*b*) of 1904, necessarily involve the loss or possible loss of property. The delay and inconvenience occasioned by visit and search may be insignificant. The existence of insurrection may interfere to some extent with freedom of commerce, and some interference is usually tolerated. The question which arises under this situation is whether the interference may extend to the visit and search of vessels of foreign States on the high sea.

Visit and search in the time of war is one of the rights of war which has existed from the early days of war

upon the sea. It is stated clearly by Lord Stowell in 1799 in the case of the *Maria:*

> The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of lawfully commissioned cruisers of a belligerent nation. (C. Robinson's Admiralty Reports, p. 340.)

The courts of the United States have repeatedly affirmed that "the right of search is a strictly belligerent right." (The *Antelope*, 10 Wheat., U. S. Sup. Ct. Repts., p. 66; the *Marianna Flora*, 11 ibid., p. 1.)

Visit and search of vessels suspected of slave trade has been allowed in time of peace by treaty, and in some instances the enforcement of customs and similar regulations has in practice extended to interference with vessels on the high seas. When a vessel is suspected of piracy measures may be taken to ascertain its character. Such measures must be taken with care, as States are jealous of the rights of their ships on the high seas.

(*a*) *Visit by established State.*—The right of visit and search for special reasons has been claimed at times by various States. The policy of the United States has been uniformly opposed to the admission of any such right except in time of war. The claim of certain States to a right to visit and search for the suppression of slave trade even was denied by the United States except when it was in accord with treaty stipulations.

The right of cruisers of an established State to visit and search in time of insurrection foreign vessels near the coast or suspected of aiding the insurrection has often been claimed. Of the exercise of visit and search by a Spanish cruiser upon the American steamer *El Dorado* in 1855 the Secretary of the Navy, in a communication to Capt. Crabbe, said:

> This act is regarded as an exercise of power which the United States have ever firmly refused to recognize, and to which they will never submit. In the absence of a declaration of war, which alone belongs to Congress, our officers in command of ships of war would have no right to pursue and retaliate for such an act. But, if present when the offense is prepetrated upon a vessel

rightfully bearing the flag of our country, the officer would be regarded as derelict in his duty if he did not promptly interpose, relieve the arrested American ships, prevent the exercise of this assumed right of visitation or search, and repel the interference by force. (S. Ex. Doc. No. 1, 35th Cong., special session.)

Spanish authorities claimed the right of visit and search in 1869 during the uprising in Cuba. Moore states the history of the case briefly, as follows:

On the 24th of March Capt. Gen. Dulce issued another decree, in which it was declared that vessels captured in Spanish waters or on the high seas near the island of Cuba having on board men, arms, and munitions of war, or articles that could in any manner contribute to promote or foment the insurrection, whatever their derivation and destination, should, after examination of their papers and register, de facto be considered as enemies of the integrity of the territory and be treated as pirates in accordance with the ordinances of the navy, and that all persons captured in such vessels would, without regard to numbers, immediately be executed. Referring to this decree, Mr. Fish, who was then Secretary of State, said that the captain general of Cuba seemed to have "overlooked the obligations of his Government pursuant to the law of nations, and especially its promises in the treaty between the United States and Spain of 1795." Under "that law and treaty," said Mr. Fish, the United States expected "for their citizens and vessels the privilege of carrying to the enemies of Spain, whether those enemies were 'Spanish subjects or citizens of other countries,' subject only to the requirements of a legal blockade, all merchandise not contraband of war." Articles contraband of war "when destined for the enemies of Spain" were "liable to seizure on the high seas," but the right of seizure was "limited to such articles only, and no claim for its extension to other merchandise, or to persons not in the civil, military, or naval service of the enemies of Spain," would be "acquiesced in by the United States." The United States could not, Mr. Fish declared, "assent to the punishment by Spanish authorities of any citizen of the United States for the exercise of a privilege" to which he might be "entitled under public law and treaties," and in conclusion he expressed the hope that the decree would be recalled or that such instructions would be given as would prevent "its illegal application to citizens of the United States or their property." (2 Moore, International Arbitration, p. 1021.)

Other cases involving the principle of visit and search or detention arose between Spain and the United States during the periods of insurrections in Cuba the latter half of the nineteenth century. The position of the

United States was consistently maintained that there could be no visit and search of merchant vessels of the United States by the cruisers of a foreign State except in time of war, and that the existence of insurrection did not bring into operation the rules of war which permitted such interference with commerce.

(*b*) *Visit and search by insurgent cruisers.*—A body of insurgents may obtain sufficient control of the sea to be able to exercise some degree of supervision of commerce with ports of the State with which they are striving. They may even proclaim that they are an organized political unity capable of declaring war, and that after such declaration they are entitled to claim the rights of belligerents, and as one of these rights the right of visit and search. It is, however, recognized as a principle of international law that full belligerent rights are obtained by an insurrectionary body, either through recognition of belligerency by the parent State which gives general belligerent rights or through recognition of belligerency by a foreign State which gives belligerent rights as far as the recognizing State is concerned. Certain acts are now tolerated by foreign States during an insurrection even when there is no thought of recognizing belligerency. It is admitted that when the insurgents are in actual control of a region many administrative acts are valid.

Mr. Chief Justice Fuller, in the case of Underhill *v.* Hernandez, November 29, 1897, says:

> Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory it is not an absolute prerequisite that that fact should be made out by any acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. (168 U. S. Sup. Ct. Repts., p. 250.)

English, American, and other courts have recognized that the existence of an insurrection changes the status of certain persons and may bring new rights and duties. The United States courts have decided that the admis-

sion of the existence of insurgency brings into operation the neutrality laws, and the English courts have made similar decisions in regard to the foreign enlistment act.

The right of visit and search has been claimed by insurgents from time to time, as well as by the established State during insurrection. The United States has opposed these claims when advanced by the established State, and even more positively when advanced by the insurgents.

Section 4295 of the United States Revised Statutes made it lawful for a private vessel to resist the aggression of an insurgent not yet recognized as a belligerent. This statute provides:

> The commander and crew of any merchant vessel of the United States, owned wholly or in part by the citizens thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

Instructions.—Instructions were sent by the Navy Department to Capt. J. R. Jarvis at the time of the Mexican insurrection, 1858–1860, as follows:

> NAVY DEPARTMENT, *July 27, 1858.*
>
> * * * You will at all times afford protection to the citizens of the United States and their property, and should occasion arise, protect any vessel of the United States from search or detention on the high seas by the armed ships of any other power. (Vol. 9, S. Ex. Doc. No. 29, p. 2, 1st sess. 26th Cong., 1859–60.)

At the time of the Chilean insurrection the Secretary of the Navy, Mr. Tracy, on March 26, 1891, gave to Admiral Brown, who was sent to relieve Admiral McCann, quite full instructions.

> On the 4th of March the department sent to Rear Admiral McCann, by telegraph, the following instructions in cipher:
>
> "Insurgent vessels, although outlawed by Chilean Government, are not pirates unless committing acts of piracy. Observe strict

neutrality. Take no part in troubles further than to protect American interests. Take whatever measures are necessary to prevent injury by insurgent vessels to lives or property of American citizens, including American telegraph cables. Endeavor to delay bombardment by insurgents until American citizens and property are removed, using force, if necessary, only as a last resort, and when serious injury is threatened. American vessels seized by the insurgents without satisfactory compensation are liable to be recovered forcibly, but you should investigate matter fully before taking extreme measures, and use every precaution to avoid such measures if possible."

As a further and more explicit guide for your action you are directed:

(1) To abstain from any proceedings which shall be in the nature of assistance to either party in the present disturbance, or from which sympathy with either party could be inferred.

(2) In reference to the ships which have been declared outlawed by the Chilean Government, if such ships attempt to commit injuries or depredations upon the person or property of Americans, you are authorized and directed to interfere in whatever way may be deemed necessary to prevent such acts; but you are not to interfere except for the protection of the lives or property of American citizens.

(3) Vessels or other property belonging to our citizens which may have been seized by the insurgents upon the high seas and for which no just settlement or compensation has been made are liable to forcible recovery; but the facts should be ascertained before proceeding to extreme measures and all effort should be made to avoid such measures.

(4) Should bombardment of any place, by which the lives or property of Americans may be endangered, be attempted or threatened by such ships, you will, if and when your force is sufficient for the purpose, require them to refrain from bombarding the place until sufficient time has been allowed for placing American life and property in safety.

You will enforce this demand if it is refused, and if it is granted, proceed to give effect to the measures necessary for the security of such life or property.

(5) In reference to the granting of asylum, your ships will not, of course, be made a refuge for criminals. In the case of persons other than criminals, they will afford shelter wherever it may be needed, to Americans first of all, and to others, including political refugees, as far as the claims of humanity may require and the service upon which you are engaged permit.

The obligation to receive political refugees and to afford them an asylum is, in general, one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contend-

ing factions or their leaders are facilitated. You are not to invite or encourage such refugees to come on board your ship, but, should they apply to you, your action will be governed by considerations of humanity and the exigencies of the service upon which you are engaged. When, however, a political refugee has embarked, in the territory of a third power, on board an American ship as a passenger for purposes of innocent transit, and it appears upon the entry of such ship into the territorial waters that his life is in danger, it is your duty to extend to him an offer of asylum.

(6) Referring to paragraph 18, page 137, of the Navy Regulations of 1876, which is as follows:

"If any vessel shall be taken acting as a vessel of war or a privateer without having proper commission so to act, the officers and crew shall be considered as pirates and treated accordingly."

You are informed that this paragraph does not refer to vessels acting in the interests of insurgents and directing their hostilities solely against the State whose authority they have disputed. It is only when such vessels commit piratical acts that they are to be treated as pirates, and, unless their acts are of such a character or are directed against the persons or property of Americans you are not authorized to interfere with them.

(7) In all cases where it becomes necessary to take forcible measures, force will only be used as a last resort, and then only to the extent which is necessary to effect the object in view. (H. Ex. Doc. No. 91, 52d Cong., 1st sess., p. 245.)

In a telegram of May 16, 1891, in regard to the insurgent steamer *Itata* which had left the United States without clearance papers and contrary to instructions of port officials, the Secretary of the Navy said to Admiral Brown:

If *Itata* is found in the territorial waters of any government except Chile do not seize, but watch and telegraph department. Answer. (H. Ex. Doc. No. 91, 52d Cong., 1st sess., p. 256)

Navy regulations.—In time of peace lawful commerce on the high sea in vessels under the flag which they are entitled to fly is free from interference by foreign cruisers. Any such interference would be regarded as a breach of unquestionable rights.

United States Navy Regulations, 1909, regarding intercourse with foreigners, provide as to the duties of the commander in chief:

340. (1) He shall exercise great care that all under his command scrupulously respect the territorial authority of foreign civilized nations in amity with the United States.

342. The use of force against a foreign and friendly State, or against anyone within the territories thereof, is illegal. The right of self-preservation, however, is a right which belongs to States as well as to individuals, and in the case of States it includes the protection of the State, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation can not be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance. In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed.

345. So far as lies within their power, commanders in chief and captains of ships shall protect all merchant vessels of the United States in lawful occupations and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations.

Conclusion.—It is evident that the right of visit and search is regarded as a right which may be lawfully exercised only in time of war. Whatever other measures as regards foreign vessels the parent State or insurgents may take in time of insurrection, they may not resort to visit and search on the high sea. Orders issued by the authorities of the United States have enjoined resistance to the exercise of visit and search under such circumstances. The law sanctions such resistance even by private vessels. The Navy regulations enjoin upon naval commanders the protection of merchant vessels of the United States from visit and search except by lawfully authorized vessels in time of war.

Solution I (a).—The comamnder of the United States cruiser should, if possible, afford the merchant vessel the necessary protection from visit and search.

Situation I (b).—Insurgency and blockade.—In lectures on "Insurgency," delivered by the present lecturer before the Naval War College in 1900, it was said:

Finally, insurgency may be regarded as a fact which is generally accepted in international practice. The admission of this

fact is by such domestic means as may seem expedient. This admission is made with the object of bringing to the knowledge of citizens, subjects, and officers of the State such facts and conditions as may enable them to act properly. In the parent State the method of conducting the hostilities may be a sufficient act of admission and in a foreign State the enforcement of a neutrality law. The admission of insurgency by a foreign State is a domestic act which can give no offense to the parent State as might be the case in the recognition of belligerency. Insurgency is not a crime from the point of view of international law. A status of insurgency may entitle the insurgents to freedom of action in lines of hostile conflict which would not otherwise be accorded, as was seen in Brazil in 1894 and in Chile in 1891. It is a status of potential belligerency which a State, for the purpose of domestic order, is obliged to cognize. The admission of insurgency does not place the foreign State under new international obligations as would the recognition of belligerency, though it may make the execution of its domestic laws more burdensome. It admits the fact of hostilities without any intimation as to their extent, issue, righteousness, etc. * * * The admission of insurgency is the admission of an easily discovered fact. The recognition of belligerency involves not only a recognition of a fact, but also questions of policy touching many other considerations than those consequent upon the simple existence of hostilities. (Wilson, Lectures on Insurgency, 1900, pp. 16, 17.)

Blockade in Chilean insurrection, 1891.—Prof. Moore, lecturing before the Naval War College in 1901, also considered the matter of insurgency and commerce under Situation V, and gave a brief statement of the action of the insurgent vessels in Chilean waters in 1891, as follows:

When the revolution was announced the British naval forces in Chile were instructed by the Admiralty to "take no part except protection of British interests." Early in the conflict the congressional deputation on the insurgent fleet notified the Government authorities and the foreign representatives that Iquique and Valparaiso would be blockaded on February 1, 1891. The Government declared that the blockade would be illegal, and urged the diplomatic corps to protest against it. At the request of the minister for foreign affairs, the diplomatic representatives of France, Germany, Great Britain, and the United States met at the foreign office to discuss the subject. On consulting they agreed that the blockade would be illegal, but that they could not directly protest against it, as this would involve a recognition of the insurgent fleet, which the Government had declared to be piratical. As a compromise they instructed the consuls to protest

at their respective ports. A protest was made by the consular body at Iquique, January 18, 1891, to the captain of the *Almirante Cochrane* as follows: "The consular body being of opinion that the blockade notified to them will cause considerable damage to the persons and property of neutrals represented by them, protest against the act, and reserve the right to claim compensation for losses incurred." A similar protest was made by the consular corps at Valparaiso.

At the same time Mr. Kennedy, then British minister at Santiago, telegraphed for instructions as to the course which should be pursued in the event of a blockade being established. The views of the foreign office on the subject may be found in a telegram to a firm in Glasgow, January 24, 1891, as follows: "Assuming effective blockade to exist, escort through it can not be given." (International Law Situations with Solutions and Notes, 1901, p. 133.)

Prof. Moore, after full discussion, concludes:

By this review it appears—

1. That the British Government admitted the right of the insurgents to establish a blockade on the usual condition of effectiveness.

2. That the British naval officers recognized the right of the insurgents to intercept contraband of war, and allowed them to a limited extent, but not as of right, to obtain coal and supplies for their fleet from neutral vessels.

3. That the right to collect duties was acknowledged to belong to the insurgents wherever they maintained complete and effective possession of the place. (Ibid., p. 118.)

Discussion in 1902.—The matter of attempt of insurgents to establish blockades was again considered in 1902, and the present lecturer was requested to put the results of the discussion in form for presentation to the Navy Department, and thence it was transmitted to the State Department for an opinion. Secretary Hay gave a carefully written opinion conforming in almost every respect to that expressed at the War College, though a little less definite in regard to the matter of admission of insurgent status. The letter is of such importance that even though printed 10 years ago the essential parts may well be printed again. Secretary Hay said:

Blockade of enemy ports is, in its strict sense, conceived to be a definite act of internationally responsible sovereign in the

exercise of a right of belligerency. Its exercise involves the successive stages of, first, proclamation by a sovereign State of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of good prize by a competent court of admiralty of the blockading sovereign.

Insurgent "blockade," on the other hand, is exceptional, being a function of hostility alone, and the right it involves is that of closure of avenues by which aid may reach the enemy.

In the case of an unrecognized insurgent, the foregoing conditions do not join. An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power. The seizure of a vessel attempting to run an insurgent blockade is not generally followed by admiralty proceedings for condemnation as good prize, and if such proceedings were nominally resorted to a degree of the condemning court would lack the title to that international respect which is due from sovereign States to the judicial act of a sovereign. The judicial power being a coordinate branch of government, recognition of the government itself is a condition precedent to the recognition of the competency of its courts and the acceptance of their judgments as internationally valid.

To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must be considered. In point of fact, the insurgents may be in a physical position to make war against the titular authority as effectively as one sovereign could against another. Belligerency is a more or less notorious fact of which another government, whose commercial interests are affected by its existence, may take cognizance by proclaiming neutrality toward the contending parties, but such action does not of itself alter the relations of other governments which have not taken cognizance of the existence of hostilities. Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing Government in the insurgent seizure of shipping flying the flag of the recognizing State. It could certainly not create a right on the part of the insurgents to seize the shipping of a State which has not recognized their belligerency.

It seems important to discriminate between the claim of a belligerent to exercise quasi sovereign rights in accordance with the tenets of international law and the conduct of hostilities by an insurgent against the titular government.

The formal right of the sovereign extends to acts on the high seas, while an insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is contested. To deny to an insurgent the right to prevent the enemy from receiving material aid can not well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent interference with foreign property within the theater of insurrection, is effected at the insurgent's risk.

To apply these observations to the four points presented in Prof. Wilson's memorandum, I may remark:

1. Insurgents not yet recognized as possessing the attributes of full belligerency can not establish a blockade according to the definition of international law.

2. Insurgents actually having before the port of the State against which they are in insurrection a force sufficient, if belligerency had been recognized, to maintain an international law blockade, may not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas, even though they be approaching the port. Within the territorial limits of the country, their right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy.

3. There is no call for the Government of the United States to admit in advance the ability of the insurgents to close, within the territorial limits, avenues of access to their enemy. That is a question of fact to be dealt with as it arises. But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters—their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. The question of the nature and mode of the redress which may be open to the Government of the injured foreigners in such a case hardly comes within the purview of your inquiry, but I may refer to the precedents heretofore established by this Government in enunciation of the right to recapture American vessels seized by insurgents. (International Law Situations—Naval War College, 1902, p. 80.)

Opinion in 1860.—The present tendency is therefore more liberal than in some earlier cases.

At the time of the Mexican insurrection of 1858–1860 the Navy Department instructed Capt. Jarvis as follows:

NAVY DEPARTMENT, *March 13, 1860.*

* * * Statements having been made which lead to the belief that arrangements are making by what is known as the Miramon government of Mexico to establish a blockade of Vera Cruz and other ports on the Gulf of Mexico, the President has decided that no such blockade will be recognized by the United States. You are, therefore, directed to employ the naval force under your command to afford American vessels free ingress and egress at all Mexican ports and fully to protect them. (Vol. 9, S. Ex. Doc. No. 29, p. 3, 1st sess. 35th Cong., 1859–60.)

Summary.—As the opinions of publicists and the practice of the United States and other States are set forth in Situation V of 1901, Situation VI of 1902, Situation III of 1904, and Situation VII of 1907, reference for certain aspects of insurgency may be made to these volumes. Prof. Moore in 1901, referring more particularly to the attempts of insurgents to interfere with contraband, says:

From what has been shown it may be argued that, without regard to the recognition or non-recognition of belligerency, a party to a civil conflict who seeks to prevent, within the national jurisdiction and at the scene of hostilities, the supply of arms and munitions of war to his adversary commits not an act of injury, but an act of self-defense, authorized by the state of hostilities; that, the right to carry on hostilities being admitted, it seems to follow that each party possesses, incidentally, the right to prevent the other from being supplied with the weapons of war; and that any aid or protection given by a foreign government to an individual to enable him with impunity to supply either party with such articles is to that extent an act of intervention in the contest. (International Law Situations, 1901, p. 137.)

The practice toward the end of the nineteenth century was to refrain so far as possible from interference with the actual conflict in a foreign State while protecting the property and rights of nationals. The claims of nationals have often been for protection which would involve interference with the conflict and a participation favorable to one or the other party. Mr. Hay stated

that when the contest had assumed the character of an insurrection—

> in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters—their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents.

In the situation under consideration the insurgents having a sufficient force before the port to effectively prevent ingress are acting within their rights in preventing the entrance of the merchant vessel of the United States, as they have this right "to prevent the access of supplies to their domestic enemy." Insurgents do not possess the right to condemn vessels as prize, which is strictly a war right. Insurgents have not a responsible government, and their conduct may be out of accord with that obligatory among States. The authorities of a foreign State may, therefore, protect the rights and property of their nationals so long as the protection does not extend to interference in the contest. To interfere to obtain the release of the merchant vessel which the insurgents have in their possession, in order that the vessel may proceed to the other party with its cargo, if of the nature of contraband, would not be justifiable unless on condition that the cargo would not be carried to the opposing party. If the cargo and vessel were innocent, release could be demanded.

Solution I (*b*).—If the only reason for the seizure of the merchant vessel is that it was about to enter a port which the insurgents have declared blockaded, the commander should grant the master's request, though the commander might require that the merchant vessel proceed to some other port.

Situation I (*c*)—*Interference with foreign property.*—Interference with foreign property has often taken place within recent years and the treatment of the insurgents has varied. In general there has been a tendency to

allow the parties to carry on their operations so long as there was not an undue interference with recognized rights of foreigners. The examples which show the practice of the period since the middle of the nineteenth century are illustrative.

Peru, 1858.—Prof. Moore cites Secretary Cass, who in a letter to Mr. Osma, the Peruvian minister, on May 22, 1858, says:

> It is the duty of foreigners to avoid all interference under such circumstances (in cases of civil war), and to submit to the power which exercises jurisdiction over the places where they resort, and, while thus acting, they have a right to protection, and also to be exempted from all vexatious interruption, when the ascendency of the parties is temporarily changed by the events of the contest. Undoubtedly the considerations you urge respecting the true character of an armed opposition to a government are entitled to much weight. There may be local insurrections, armed opposition to the laws, which carry with them none of the just consequences recognized by the law of nations as growing out of a state of civil war. No fixed principle can be established upon this subject, because much depends upon existing circumstances. Cases, as they arise, must be determined by the facts which they present; and the avowed objects of the parties, their relative strength, the progress they respectively make, and the extent of the movement, as well as other circumstances, must be taken into view.
>
> While contending parties are carrying on a civil war those portions of the country in the possession of either of them become subject to its jurisdiction, and the persons residing there owe to it temporary obedience. But when such possession is changed by the events of the war and the other party expels its opponents, the occupation it acquires carries with it legitimate authority, and the right to assume and exercise the functions of the government. But it carries with it no right, so far, at any rate, as foreigners are concerned, to give a retroactive effect to its measures and expose them to penalties and punishments and their property to forfeiture for acts which were lawful and approved by the existing government when done. (1 Moore, International Law Digest, sec. 20, p. 43.)

Case of the "Haytien Republic," 1888.—In a letter to Mr. Bayard, Secretary of State, October 27, 1888, the agents for the steamship *Haytien Republic* said:

> Sir: We are informed that the consul of the Haitian Government in New York has received a cablegram from Port au Prince

stating that the steamship *Haytien Republic*, of Boston, has been seized at St. Marc, Haiti, and that ship and crew have been taken to Port au Prince and there detained.

The steamship *Haytien Republic* is owned and manned by citizens of the United States, and is regularly employed in carrying United States mails, passengers, and general freight between the United States and Haiti. Said steamship cleared and sailed from New York on the 4th instant, with United States mails, several passengers, and general cargo for various ports in Haiti, having no arms, ammunition, or unlawful merchandise on board.

We have no information from the master of the vessel whatever as to the seizure, and fear that he has been prevented from communicating with us.

The detention of the steamer causes great pecuniary loss to the owners of the steamer and cargo.

We therefore respectfully ask that the case may be investigated, and that a Government vessel be sent to Port au Prince at once to secure the liberty of the crew and to protect the interests of all concerned.

We remain, etc., B. C. MORSE & Co.,
Agents for Steamship "Haytien Republic."

(U. S. S. Ex. Doc. No. 69, 50th Cong., 2d sess., p. 69.)

The Haitian authorities, under whose orders the *Haytien Republic* was taken into port, expressed their ideas of the action in the summons to the captain of the *Haytien Republic* and the local agent as follows:

Whereas during the existence of a state of war it is the duty of neutrals to abstain from all participation in the contest that is going on;

Whereas the American steamer *Haytien Republic* has violated those principles of neutrality by transporting troops, arms, and emissaries for the account of the insurrection;

Whereas those acts furnish sufficient reason to consider that vessel as being hostile;

Whereas on the 16th day of October the provisional government declared the ports of the Cape, St. Marc, and Gonaives to be blockaded; whereas due notice thereof was given to the representatives of the neutral powers, and the decree announcing the blockade was published in all the towns of the Republic; whereas when the steamer *Haytien Republic* appeared off the port of St. Marc, that port was blockaded;

Whereas the blockade was effective, since the Haitian advice vessel *Dessalines* guarded the entrance; and whereas the *Haytien Republic* must have eluded the vigilance of the blockading forces

and have taken advantage of its superior speed so as not to be sunk;

Whereas signals were made to it, and six cannon shots, with ball, were fired at it for the purpose of stopping it, which acts constitute a sufficient special notice of a blockade;

Whereas the vessel was captured just as it was sailing out of the port of St. Marc, into which it had forced an entrance and to which it had borne dispatches;

Whereas numerous evidences confirm its illegal participation in the acts of the insurrection of the north; whereas the captain refused to show his papers or to allow his vessel to be searched by the examining judges, which he did in order to conceal the papers that were likely to compromise him; and whereas he also refused to allow seals to be placed upon his vessel;

Whereas a delegation consisting of leaders of the insurrectionary movements is still on board of his vessel, and was there at the time when the capture took place;

Whereas the violation of a blockade is an offense which is provided for and made punishable by international law;

To hear sentence pronounced upon them, the one to be condemned to the forfeiture and relinquishment of the vessel under his command, which is to be awarded to the Haitian Government, to which it has occasioned great injury, and the cargo thereof to be confiscated. (Ibid, p. 116.)

In the Haytian statement of the law which governed this case was the following:

Considering that in case of war between two States, and, therefore, in case of insurrection of a portion of a country against the established Government, neutral States and their subjects are bound not to interfere in the struggle, whether it be to aid one of the belligerents or to aid the rebels.

That the neutrals who break this obligation render themselves liable to be treated as enemies, and that this rule applies to ships as to individuals.

That it is generally admitted that the neutral ship which transports either troops, arms, correspondence, or emissaries, who enters in any manner whatsoever into the service of one of the belligerents, or in that of the insurgents, places itself beyond the protection given to neutral property, and can be lawfully condemned and confiscated. (Ibid, p. 129.)

Many other specific considerations were enumerated, and finally the decision was rendered on October 31 confiscating the steamer, contraband, and goods belonging to the enemy, making the captain and crew liable to

further proceedings, and condemning the owners to pay 50,000 piasters.

On November 2, 1888, the minister of the United States sent a letter protesting against the action:

LEGATION OF THE UNITED STATES,
Port au Prince, Haiti, November 2, 1888.

SIR: The undersigned has been informed authoritatively that a tribunal has rendered a verdict that the American steamship *Haytien Republic* be delivered to the authorities at Port au Prince, and in consequence that all of the crew on board leave the ship. Now I, the undersigned, minister resident of the United States, protest in the name of the Government of the United States against:

(1) The seizure of such vessel.

(2) Against the irregular tribunal that has rendered the decision.

(3) Against the verdict.

(4) Against any action being taken by the authorities until I can receive instructions from my Government.

And do by the present hold the authorities of Port au Prince responsible for all damages in the premises, declaring most solemnly, at the same time, that the crew of the above-mentioned steamer are under the protection of my flag, the ensign of the United States of America.

The undersigned has the honor to be, sir, with assurance of distinguished consideration,

Your obedient servant,

JOHN E. W. THOMPSON.

Hon. OSMAN PIQUANT,
Secretary of State of Foreign Relations ad interim,
Port au Prince.

(Ibid, p. 163.)

In a long review and opinion on the case Secretary Bayard on November 28, 1888, said:

On the 26th instant the department received a full report upon the case by the captain of the United States steamer *Boston*, who had just returned from Port au Prince to the port of New York.

Upon examinations of the record and proceedings in the case, the department is led to the conclusion that the seizure and detention of the vessel and the imprisonment of her officers have, from the beginning, been irregular and wrongful; that she should, without delay, be restored to her American owners, and her officers released from all detention; and that adequate compensa-

tion should be made to them and to the owners of the vessel for the loss and injuries they have suffered by reason of the proceedings in question.

It is unnecessary to discuss the charge of attempting to run a blockade, upon which allegation it is understood that the seizure of the vessel was originally made. Whether any valid blockade did or did not exist, it is clear that the *Haytien Republic* had and could have had no notice of it. (Ibid., p. 171.)

Then after mentioning other matters the irregularity of the proceedings are referred to and the treaty provisions cited:

From the above stipulations it is manifest that so far as the proceedings against the *Haytien Republic* rest upon a charge of attempting to run a blockade, they were in clear violation of the express terms of the treaty, and wholly improper and inadmissible.

Nor can the tribunal by which the charges against the *Haytien Republic* and her officers were examined be recognized by this Government as competent for that purpose. By the twenty-eighth article of the treaty above referred to it is provided that in matters of prize "in all cases the established courts for prize causes in the country to which the prizes may be conducted shall alone take cognizance of them."

The tribunal before which the *Haytien Republic* and her officers were brought was hastily improvised for the occasion and consisted of two commissioners specially appointed on the 21st of October, 1888, to examine the case of the *Haytien Republic*. It was in no sense "an established court for prize causes," as stipulated in the treaty, but had for its special and only authority the order of the provisional president, Légitime. Its proceedings had scarcely a feature of formality and regularity. (Ibid., p. 173.)

Reviewing the conditions in Haiti, Secretary Bayard further says:

Local supremacy in Haiti thus shifts from week to week, and from hand to hand, so rapidly and unexpectedly that it would be wholly unreasonable and impossible to subject the merchant marine and citizens of other countries, who find themselves so surrounded by factions contending violently for mastery, to extreme penalties, because of their alleged favor to either side, or because of their necessary and enforced acquiescence in the demands of factions locally and temporarily in power.

The rights of person and property of American citizens engaged in business in Haiti can not be permitted to become the football

of contesting factions and their evanescent authority; and the protecting arm of the United States will be interposed for their security. By this it is not intended to include cases of deliberate intermeddling in local conflicts, but merely to rescue our citizens who may be caught in the eddies of local sanguinary émeutes.

The defects and misfortunes of the Republic of Haiti must not be visited upon the citizens of a friendly country, who have contributed in no way to the unhappy condition of affairs with which they find themselves unexpectedly confronted. * * * In view, therefore, of what I have herein fully laid before you I desire to express, under the direction of the President, his confident expectation that without delay the steamer *Haytien Republic* will be released by the authorities at Port au Prince and returned to the custody of her officers and crew, and that investigation may be at once commenced to ascertain the injuries inflicted upon the owners of the vessel, and also upon the captain, officers, and crew in the course of this illegal and most regrettable interference with their rights. (Ibid., p. 175.)

There was much further correspondence and considerable delay. At length, on December 20, 1888, Rear Admiral Luce sent to the minister of the United States in Haiti the following communication:

U. S. FLAGSHIP "GALENA,"
Port au Prince, Haiti, December 20, 1888.

SIR: The President of the United States having decided that the seizure and detention of the American steamer *Haytien Republic* by the Haitian authorities "have from the beginning been irregular and wrongful," I am here to cooperate with you in obtaining her prompt restoration.

As my stay at Port au Prince is very limited, I must ask that you will, at the earliest practicable moment, represent to the Haitian authorities the necessity of the immediate withdrawal of the guard from the steamer *Haytien Republic*, in order to avoid the possibility of a collision between it and the officer I shall shortly send to her. The guard having been withdrawn, the formalities attending the transfer of the vessel to her owners or their agents can readily be arranged.

To prevent misunderstanding and the untoward results that might follow, I beg you will inform the authorities that an officer of this command will be ready to receive the *Haytien Republic* at 3 o'clock this p. m., by which time it is hoped the guard will have been withdrawn.

As it is my intention to take the steamer to the anchorage in the outer harbor this afternoon before sunset, I doubt not that the feeling of friendship which has always so happily existed between

the two countries will prompt the authorities to render every facility for carrying that intention into execution.

Very respectfully, etc.,

S. B. LUCE,
Rear Admiral, United States Navy, Commanding United States Naval Forces, North Atlantic Squadron.

JOHN E. W. THOMPSON,
United States Minister to Haiti.

(Ibid., p. 242.)

A letter of December 26, 1888, to the minister, says:

DEAR SIR: In our very informal conversation yesterday afternoon with President Légitime and secretary of foreign affairs, Mr. Margron, I noticed that the latter had a totally erroneous impression of the proceedings of the 20th instant in connection with the American steamer *Haytien Republic.*

That vessel was not taken by force, as Mr. Margron seems to think. As this misconception of the whole transaction may be shared by President Légitime and his cabinet, it seems to me that no time should be lost in representing the transaction in its true character.

On our arrival here it was only reasonable on our part to suppose that the Haitian Government would accept in good faith the decision of the President of the United States in the case of the steamer and be ready to restore her promptly on that decision being made known. I went in the *Yantic* to the inner harbor that I might be on the spot myself to see that all due and proper forms should be complied with.

In my letter to you of the 20th it was stated that I was here to cooperate with you in obtaining the release of the vessel; and further on I say "to prevent misunderstanding * * * I beg you will inform the authorities that an officer of this command will be ready to receive the *Haytien Republic* at 3 o'clock, at which time it is hoped the guard will have been withdrawn." Not a soul of the *Yantic's* crew was allowed to go on board the *Haytien Republic* until the receipt of Mr. Margron's letter to you giving up the vessel. As the *Yantic* had scant room to turn, a small line was attached to the cable of the *Haytien Republic* and another to the Norwegian bark, those two vessels being most convenient for the purpose. This was done to steady the *Yantic* and keep her from swinging about.

The object of taking the *Yantic* to the inner harbor were twofold—first, that I might be on the spot to complete the arrangements and, secondly, that a ship might be there to tow the *Haytien Republic* out. This latter duty was saved us through the courtesy of the Haitian authorities, who placed the *Grande Riviere* at our service for that purpose.

It was my particular care to abstain from any hasty action and to receive the vessel at the hands of the Haitian Government in accordance with the terms of the decision arrived at by the President of the United States.

This places the affair in a totally different light from that represented by Mr. Margron yesterday, and it is due to all concerned that he should be set right in the matter.

Respectfully,

S. B. LUCE,
Rear Admiral, United States Navy,
Commanding North Atlantic Squadron.

(Ibid., p. 263.)

Later the Secretary of State wrote to the Secretary of the Navy:

DEPARTMENT OF STATE,
Washington, January 3, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of 31st ultimo, and of a copy of a communication from Admiral Luce of the 21st ultimo, in which he conveys a clear and conclusive report of his action in executing the duty assigned him of receiving the steamer *Haytien Republic* from her captors at Port au Prince and restoring her to the possession of her owners or their agents.

The vigor, tempered with high and intelligent discretion, which has characterized the action of Admiral Luce in the execution of this national duty to American citizens wrongfully deprived of their property in the turmoil of political disorder in foreign waters is most satisfactory to this department, and it is now hoped that the presence of our national vessels in Haitian waters may soon be rendered unnecessary.

I have, etc., T. F. BAYARD.

The SECRETARY OF THE NAVY.

(Ibid., p. 249.)

Brazil, 1894.—In 1894, during the insurrection in Brazil, American commerce in the harbor of Rio de Janeiro was interrupted and lives and property were endangered. Admiral Benham notified the insurgents that he proposed, while not interfering with legitimate military operations, to protect by force, if necessary, American interests. Minister Thompson reported:

The insurgents are denied the right to search neutral vessels or to seize any part of their cargoes, even though such cargoes should comprise such articles as would in the case of war between two independent governments come within the class of

merchandise defined as contraband of war. The insurgents in their present status would commit an act of piracy by forcibly seizing such merchandise.

He adds that to the best of his information all the foreign commanders agree with Admiral Benham and that the effective action of last Monday has restored complete tranquillity, broken the attempted blockade of commerce and trade, and placed everything in even motion. (U. S. Foreign Relations, 1893, p. 117.)

To this Secretary Gresham replied, February 1, 1894:

Mr. Gresham states that Admiral Benham has acted within his instructions, and that it is therefore hoped that Mr. Thompson, whose telegram is satisfactory, is in accord with the admiral. (Ibid., p. 117.)

The letter of Admiral Benham to Admiral da Gama on January 30, 1894, assumes a more extreme position in the second paragraph than that which is now assumed in regard to insurgents.

U. S. Flagship "San Francisco" (Second Rate),
Rio de Janeiro, Brazil, January 30, 1894.

Sir: In reply to your communication of yesterday, which I had the honor to receive, asking if my action of the 29th "means positive interference in our domestic trouble, or if it only refers to the protection of commerce under the American flag," permit me to say that a careful perusal of the letters which I have had the honor of addressing you would, I think, make this question unnecessary, as they all refer to acts of violence and interference committed by your orders against American vessels, and of my intention to protect these vessels. However, that there may be no misunderstanding, I have to say, that in no case have I interfered in the slightest way with the military operations of either side in the contest now going on, nor is it my intention to do so. That is not my mission. My duty is to protect Americans and American commerce, and this I intend to do to the fullest extent. American vessels must not be interfered with in any way in their movements in going to the wharves or about the harbor; it being understood, however, that they must take the consequences of getting in the line of fire where legitimate hostilities are actually in progress. I am not laying down any new principle of action. My course rests upon well-established principles of international law.

There is another point which it may be well to speak of now: Until belligerent rights are accorded you, you have no right to exercise any authority whatever over American ships or property of any kind. You can not search neutral vessels or seize any portion of their cargoes, even though they be within the class

which may be clearly defined as contraband of war during hostilities between two independent Governments. The forcible seizure of any such articles by those under your command would be, in your present status, an act of piracy. Regretting that I am forced to speak thus plainly,

I have, etc., A. E. K. BENHAM,
Commanding United States Naval Force
on South Atlantic Station.

(U. S. Foreign Relations, 1893, p. 122.)

Cuban insurrections.—In 1895 three naturalized citizens of the United States residing in and doing business in Cuba requested information as to the protection of their property. They addressed the following letter to the American consul general at Habana.

SANCTI SPIRITUS, *June 13, 1895.*

SIR: We, the undersigned American citizens and property holders in several municipal districts of this island, having received intelligence that the insurgents have forbidden the extraction of cattle from the farms; and, furthermore, seeing through the newspapers the wanton destruction of property throughout the island, with marked tendencies to anarchy, apply to you for information on the following points, viz:

Have we the right to apply to the Spanish authorities for such forces as would be required to safely conduct our cattle to the nearest market?

Should the Spanish authorities deny our request, what shall we do?

In what form are we to protest, and under what circumstances can we make good our claims to damages?

We furthermore understand that in certain cases the insurgents have threatened to destroy property unless a certain bounty is paid. What are we to do in case such a threat is made to us?

We would be thankful for full information, if possible, through the Department of State, on these subjects, and with much respect, etc.,

JOSE RAFAEL REYES Y GARCIA.
ANTONIO M. YZNAGA.
EDUARDO ALVAREZ CERICE.

(U. S. Foreign Relations, 1895, Part. II, p. 1215.)

The Acting Secretary of State made the following reply:

DEPARTMENT OF STATE,
Washington, July 1, 1895.

SIR: Your dispatch, No. 2517, of the 19th instant, has been received. You therewith forward copy of a letter received by

you from three Cuban landowners, American citizens, and residents of Sancti Spiritus, making inquiries concerning the protection of their property from seizure or destruction by insurgents. In particular the writers state that they have learned that the insurgents have forbidden the removal of cattle from the farms, and ask if they have the right to apply to the Spanish authorities for the protection of their property, in conducting their cattle to the nearest market, and, in case of refusal, under what circumstances and in what form they can make protest for damages.

It is a generally accepted principle of international law that a sovereign government is not ordinarily responsible to alien residents for injuries that they may receive within its territories from insurgents whose conduct it can not control. Within the limits of usual effective control law-abiding residents have a right to be protected in the ordinary affairs of life and intercourse, subject, of course, to military necessities, should their property be situated within the zone of active operations. The Spanish authorities are reported to be using strenuous endeavors to prevent the class of spoliations which the writers apprehend, and notification of any particularly apprehended danger from the insurgents would probably be followed by the adoption of special safeguards by the authorities. In the event, however, of injury, a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, being in a position to prevent such injury, have failed to use due diligence to do so.

It is impossible to give more precise instructions upon the hypothetical case presented. Should injury be actually suffered, and the facts be fully represented, this department would be in a position to determine its duty, if anything, in the premises.

I am, etc.,

EDWIN F. UHL,
Acting Secretary.

(Ibid., 1216.)

The claim of Rosa Gelbtrunk.—

In November, 1898, there was a revolution in Salvador and a revolutionary force occupied the city of Sensuntepeque, where a quantity of merchandise of the value (in silver) of $22,000 and upward, belonging to the firm of Gelbtrunk & Co., was stored. There is no dispute as to the value of these goods or as to the fact of their being the property of Gelbtrunk & Co. The soldiers of the revolutionary army possessed themselves of the goods—looted them, in short—and sold, appropriated, or destroyed them. It does not appear that this was done in carrying out the orders of any officer in authority or as an act of military necessity, but,

so far as it appears, it was an act of lawless violence on the part of the soldiery. The firm of Maurice Gelbtrunk & Co. having assigned their claim against the Republic of Salvador to the present claimant, Rosa Gelbtrunk, the wife of Isidore Gelbtrunk, Mrs. Gelbtrunk (who, following the status as regards nationality of her husband, was also an American citizen) appealed to the Government of the United States to intervene on her behalf in claiming indemnity for the property lost. (U. S. Foreign Relations, 1902, p. 877.)

In deciding on this case, referred to arbitration, the arbitrators, Henry Strong, chief justice of the Dominion of Canada, Don M. Dickinson, of Michigan, David Castro, chief justice of Salvador, were unanimous. The opinion prepared by Mr. Justice Strong stated:

The principle which I hold to be applicable to the present case may be thus stated: A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own is to be considered as having cast in his lot with the subjects or citizens of the State in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that State, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that State are liable to the same. The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens.

This I conceive to be now the well-established doctrine of international law. The authorities on which it has been so established consist of the writings of publicists and diplomats, the decisions of arbitrators—especially those of mixed commissions—and the text of writers on international law.

It is, however, not to be assumed that this rule would apply in a case of mob violence which might, if due diligence had been used, have been prevented by civil authorities alone or by such authorities aided by an available military force. In such a case of spoliation by a mob, especially where the disorder has arisen in hostility to foreigners, a different rule may prevail. It would, however, be irrelevant to the present case now to discuss such a question. It therefore appears that all we have to do now is

to inquire whether citizens of the United States, in the matter of losses incurred by military force or by irregular acts of the soldiery in the revolution of November, 1898, in Salvador, were treated less favorably or otherwise than the citizens of Salvador.

To this inquiry there can be but one answer: They were not in any way discriminated against, for the legislature of the Republic in providing indemnity for such losses applied the same as well to foreigners as to the citizens of Salvador.

For these reasons I am of opinion that we have no alternative but to reject this claim. (Ibid., pp. 877, 878.)

Bolivia, 1900.—In December, 1900, a body of revolutionists, organized in opposition to the Bolivian Government, seized goods on board the steamship *Labrea*, which was sailing with goods for the Bolivian Government to places on the river Acre. The insurance company was sued in order to recover the insurance on these goods, which in the policy were "warranted free of capture, seizure, and detention * * * piracy excepted." The court decided in 1909 that as the goods were not seized for private but in "furtherance of a political adventure" that the act was not piratical. (Republic of Bolivia *v.* Indemnity Mutual Assurance Co. (Ltd.), Law Reports, 1909, 1 Kings Bench, p. 785.)

Haiti, 1902.—A brief statement of action in time of insurrection in a case which involved a somewhat extended correspondence and considerable exercise of discretion on the part of the naval officer in command is as follows:

EMBASSY OF FRANCE,
Manchester, Mass., August 7, 1902.

I received from the manager of the French Cable Co. at New York a telegram saying that the Haitian vessel *Crête à Pierrot* intends to cut the cables of the company. The superintendent of the station of the French Cable Co. at Port au Prince has informed the commander of the American cruiser *Machias* of this danger.

Commander McCrea seems to be disposed to protect the cable which lands in Haiti, but he would be glad to receive instructions from the Navy Department at Washington on the subject. I should be very grateful to you, if you see no objection, if you would request the Navy Department to send at once, by cable, to the commander of the *Machias* the necessary instructions to

protect the French cable in Haiti from any attempt at destruction, all nations being equally interested in the working of this cable.

PIERRE DE MARGERIE,
Chargé d'Affaires.

DEPARTMENT OF STATE,
Washington, August 11, 1902.

SIR: I have the honor to inform you that your telegram of the 7th instant was at once sent to the Navy Department, and that that department has instructed the commanding officer of the *Machias* to act in his discretion to prevent any destructive or injurious act against foreign interests or property in Haiti not in the line of hostilities.

Accept, etc., ALVEY A. ADEE,
Acting Secretary.

(U. S. Foreign Relations, 1902, p. 417.)

Colombia, 1902.—In a telegram from Acting Secretary of State in 1902 to the United States representative in Colombia it was said:

DEPARTMENT OF STATE,
Washington, August 27, 1902.

Replying to Mr. Hart's telegram of August 21, Mr. Adee states that article 8 of the treaty of 1846 stipulates equitable and sufficient indemnification; that the treaty does not stipulate when compensation shall be made, but, according to general principles of international law, private property is subject to seizure only by way of military necessity, and the military commander must cause receipts to be given which will serve owner to obtain indemnification guaranteed by treaty, unless compensation is made at the time of seizure.

(U. S. Foreign Relations, 1902, p. 310.)

United States, 1903.—The United States in 1903 rejected certain claims of British subjects for loss of property by insurgent action in the Philippines in 1899.

Secretary Hay, in replying to the letter of the British ambassador, says:

DEPARTMENT OF STATE,
Washington, January 27, 1903.

MY DEAR MR. AMBASSADOR: I have received your personal note of the 31st ultimo, with inclosure, relating to certain claims of British subjects which have been brought to this Government's attention from time to time, and which arose out of the operations during the recent War with Spain.

The department concurs in the expression contained in your note that "not the least of the calamities resulting from a state of war is the loss caused thereby to the subjects or citizens of neutral powers possessing property or engaged in business in the affected area." The losses sustained by His Majesty's subjects mentioned in the memorandum accompanying your note come within the category of cases above described, in which, as you say, "It often happens that the destruction of that property or damage to that business is a matter of military necessity to one of the belligerents." And such destruction may sometimes be wantonly inflicted by insurgents, which, though equally deplorable, does not create liability on the part of the titular government in the circumstances existing in connection with said claims.

These claims appear to the department to be quite different in legal character from those which arose in behalf of American citizens expelled by the British authorities from South Africa, and for which His Majesty's Government graciously made compensation. However much I might be personally disposed to recommend a compensation in these cases as a matter of grace and favor, as is suggested in your note, I am persuaded that such recommendation to Congress would be fruitless, in view of the adverse report of the Senate Committee on Foreign Relations in the mentioned claim of William Hardman, and in view of the further fact that the Government of the United States would probably be reluctant to set a precedent for the making of compensation for the losses of property caused by the action of insurgents beyond the control of the military authorities of the United States, and for whose action the latter was not morally culpable. Such a precedent, if set, would doubtless be followed by the presentation of numerous other large claims for compensation for property destroyed by acts of insurgents.

The claim of Mr. J. Walter Higgin, now presented for the first time, is of the same essential legal character as those which have already been rejected by the department.

I am, etc., JOHN HAY.

(U. S. Foreign Relations, 1903, p. 482.)

Disturbances in Santo Domingo, 1905.—In the latter part of the year 1905 there was an active opposition to the established Government of Santo Domingo. The authorities of Santo Domingo, fearing that the revolutionists might be successful to such an extent that they would attack the customhouse, requested the American minister to ask that a ship of war be sent. Accordingly the American minister cabled for the warship and received reply:

WASHINGTON, *November 7, 1905.*

DAWSON, *American Legation, Santo Domingo:*

Warship ordered to Macoris. If marines required to restore order, there should be first an express and clear request from the Dominican Government that they be landed for temporary protection of life of American citizens, which Dominican Government declares itself for time being unable to protect. Upon such request necessary force will be landed. Naval officers will be instructed to act upon notice from you that such assistance has been requested. An immediate understanding on this subject with the Dominican Government seems important.

ROOT.

Minister Dawson says of his further conduct:

Upon receiving this telegram I called upon the minister of foreign affairs and told him of its contents. He said that he had always understood that the primary duty of protecting American citizens in the Republic, including those who are employed by his Government to collect its customhouse revenues, falls upon the Dominican Government. In view of that duty and of your telegram to me, it remained clearly understood that the American Government would not land armed forces unless the Dominican Government, finding itself unable to protect the lives of American citizens employed in its customhouses, or elsewhere, should request such landing. Up to the present time the Dominican Government has maintained order, and its authority in the city of Macoris and its immediate vicinity, and at all the other ports of entry, with the exception, perhaps, of Monte Christi, and he hoped would continue to be able so to do. He had suggested, not the present landing of marines, but only the presence of a ship in the neighborhood, so as to be prepared for prompt action in the contingency of a sudden reverse to the Government forces.

I thereupon telegraphed you as follows:

SANTO DOMINGO, *November 8, 1905.*

SECRETARY OF STATE, *Washington:*

I have reached perfect understanding with the Dominican Government in accordance with instruction your cipher telegram of this morning. Macoris quiet in the city. No further news from the interior. Mere presence of a United States vessel probably will be sufficient.

DAWSON.

On the 10th the U. S. S. *Denver* reached Macoris, and on the same day the *Olympia*, with Admiral Bradford on board, anchored at this port. Since that time matters have outwardly continued in statu quo in the cities of Macoris and Santo Domingo. (U. S. Foreign Relations, 1905, p. 405.)

On December 6, 1905, the American Secretary of State sent further instructions:

Dispatches received here by Navy Department from Bradford and by Joubert from Vasquez represent serious disturbance. The President wishes you to urge amicable settlement of differences in Government. There is good reason to expect early action on treaty here. We can not take any part in differences between factions or officers of Dominion Government. No troops are to be landed except when absolutely necessary to protect life and property of American citizens, and if landed they must confine themselves strictly to such protection, which will extend to the peaceable performance of duty by the Americans who are collecting revenue in the customhouses so long as the Dominican Government desires them to continue that service. If Dominican Government determines to end the modus vivendi and the collection of duties by Americans nominated by President of the United States, protection will extend to their safe withdrawal with their property.

Notice of such termination should be given formally. We are about to withdraw several of our ships, which will return to United States with Admiral Bradford.

ROOT.

(Ibid., p. 408.)

Cuba, 1906.—The following telegram sent by Mr. Sleeper, chargé d'affaires in Cuba, to the Secretary of State of the United States and the reply of the Secretary show the attitude of the United States toward protection of property of nationals:

HABANA, *August 28, 1906.*

In all cases of damage, destruction, or seizure of property against the will of the owner by agents of the Government or other parties, a complaint stating the facts and containing a list of the property so damaged, destroyed, or seized should be made to the court having jurisdiction, a copy of said complaint being forwarded at the same time to this legation. Wherever possible a statement in case property is damaged or destroyed and a receipt in case property is appropriated, subscribed to by the person or persons responsible for such damage or destruction or making such appropriation should be procured. (U. S. Foreign Relations, 1906, Pt. I, p. 457.)

The Secretary approved Mr. Sleeper's action in a telegram of August 29, 1906:

DEPARTMENT OF STATE,
Washington, August 29, 1906.

Mr. Adee informs the legation that the proposed advice to parties despoiled by insurgents has the department's approval. Action Mercedita case also approved. (Ibid., p. 460.)

Colombia, 1907.—In a report upon the claim of Mr. Deeb, the American chargé at Bogota showed that Colombia still maintained that "there are no grounds for any recognition whatesoever on account of levies caused by the revolutionaries." The letter from the chargé and the judicial decision are as follows:

AMERICAN LEGATION,
Bogota, September 2, 1907.

SIR: Referring to my No. 139, of December 29, 1906, relative to the claim of Richard A. Deeb, an American citizen, against the Government of Colombia for horses, mules, cattle, and merchandise taken from him by federal and insurgent troops during the revolution that existed in Colombia in the years of 1901 and 1902, in which dispatch I stated that I had taken up with the foreign office the settlement of that claim, I have the honor and pleasure to report that through my persistent efforts the Government has now issued a resolution allowing the claim of Mr. Deeb in the sum of $25,069 gold, payable in foreign bonds, in accordance with the judicial decision pronounced by the examiner of the second section of the department of foreign affairs and with the concurrence of the council of ministers, a copy of which, clipped from the Diario Oficial of this city of to-day, I inclose in duplicate, as well as a translation of the same, also in duplicate.

Mr. Deeb claimed indemnity in the sum of $72,471.12 gold, $42.000 of which being, as was alleged, for levies caused by revolutionaries, and was disallowed, the Government holding that it did not recognize claims for damages caused by the insurgent forces; and of the remainder, namely, $30,471.12, the sum of $5,402.12 was disallowed for lack of proper evidence, resulting in a balance in Mr. Deeb's favor of $25,069, which that gentleman has accepted in full settlement of his claim against the Government of Colombia.

It is gratifying to me to add that, as with the two other claims against the Government of Colombia recently reported to the department (in dispatches Nos. 213, 217, and 225), and which I have had the satisfaction of bringing up to the point of settlement, the payment of the claim of Mr. Deeb was arranged by me with perfect harmony and attended by the exhibition of the greatest courtesy on the part of the officers of the Government.

Mr. Deeb, a Syrian by birth, although an American citizen by naturalization, whom I found to be a man of superior intelligence and exceptional refinement, informed me that it is his intention to return within a few months to the United States, where he would again take up his permanent residence.

I have, etc., WM. HEIMKE.

(U. S. Foreign Relations, 1907, Pt. I, p. 290.)

[Inclosure—Translation.]

[Extract of the judicial decision in the claim of Richard A. Deeb, an American.]

Under date of the 28th of October, 1901, Mr. Richard A. Deeb presented to the ministry of war a memorial introducing his claim. Subsequently, on the 27th of July, 1906, it was passed to this department for its examination and decision.

He claimed $72,471.12 gold.

In this amount there are included $42,000 for levies caused by the revolutionists.

The record having been examined, the ministry found it in conformity with law 27 of 1903 and its organic decree, and proceeded to pronounce its decision on the 10th of August, 1907, which, in its determinate quality and with the concurrence of the council of ministers, says:

"First. There are no grounds for any recognition whatsoever on account of levies caused by revolutionaries, as defined in article 3 of law 27 of 1903.

"Second. The only and definitive indemnification adjudged to Mr. Richard A. Deeb, American citizen, as the sum total of the present claim, is the amount of twenty-five thousand and sixty-nine dollars ($25,069), payable in foreign bonds.

"Ordered to be entered in the register and published in the Daily Official Gazette; and if the result is accepted, an authentic copy hereof is to be sent to the ministry of the treasury for its action, and the record is to be filed.

"For the minister, the subsecretary,

"FRANCISCO JOSE URRUTIA."

China, 1911.—The following correspondence in regard to the troubles in China in consequence of the change in the form of government is a recent example of protection afforded to foreign trade.

THE UNITED PROVINCES OF CHINA,
PROVISIONAL GOVERNMENT, FOREIGN OFFICE,
Shanghai, November 27, 1911.

SIR: It has been reported to this Government that munitions of war and other contraband goods are now frequently conveyed by foreign and other vessels, and at the request of the military commander, Mr. Chen, I have the honor to inform you that this Government will send gunboats to cruise the waterways at or about Woosung and Kiang-yin Forts for the purpose of boarding suspected foreign and native merchant steamers for contraband of war, and that if any should be discovered and seized they will be taken to the prize court for trial before confiscation.

As occasion may arise when it may be found necessary to fire upon the warships of our enemies from the Woosung Forts, we

would request that foreign vessels, as well as all foreign merchant ships, should no longer anchor within the range of firing from these forts, and that at night they should not pass the Woosung Forts, but if they should be compelled to do so in case of necessity, a few hours' notice in advance should be given to the officer in charge of the forts. I shall feel obliged if you will request your colleagues to communicate with their admirals about the matter.

Sir, your obedient servant,

WU TING FANG.

S. SIFFERT, Esq.,
Consul General for Belgium and Senior Consul, Shanghai.

AMERICAN CONSULAR SERVICE,
Shanghai, China, December 7, 1911.

Rear Admiral J. B. MURDOCK,
Commander in Chief, United States Asiatic Fleet, Shanghai.

SIR: I have the honor to append a letter addressed to the Senior Consul by Mr. Wu Ting Fang under head, "The United Provinces of China, Provisional Government, Foreign Office, dated December 4, 1911:

SIR: With reference to my letter of November 27, I beg to say that this Government finds it necessary to send officers to board suspected foreign and native merchant vessels for contraband of war when passing through their territory.

I have the honor to be, your obedient servant,

WU TING FANG.

I may add that at a meeting of the consular body December 6 the decision was merely to acknowledge the receipt of Mr. Wu Ting Fang's letter of November 27, noting that in taking such action as he indicates, he and his associates proceed at their own risk.

I further inform you that I have personally sent copy of your letter of December 2 to me to Mr. Wu Ting Fang.

In have the honor to be, sir, your obedient servant,

AMOS P. WILDER,
Consul General.

UNITED STATES ASIATIC FLEET,
U. S. S. "RAINBOW," TEMPORARY FLAGSHIP,
Shanghai, China, December 2, 1911.

SIR: Referring to the letter from Mr. Wu Ting Fang, forwarded by you, I beg to state that as the United States has not accorded belligerent rights to the revolutionists in China, I should be unable to acquiesce in the seizure by them of American vessels under any pretext whatever.

In view of the recognized position of Shanghai as a great center of international commerce, and of the right to trade there secured by treaties with the titular Government, the request of Mr. Wu Ting Fang, that foreign vessels should not anchor in the usual anchorage on account of being in the line of fire of the forts, appears to needlessly entail inconvenience on American shipping. In the case of actual hostile operations every precaution would of course be taken to prevent any inconvenience to the combatants, but at other times United States vessels should be allowed to enter and leave Shanghai, and carry on their trade in the usual manner. The fact that, to the best of my knowledge, there are no men-of-war in China bearing the flag of the titular Government, effectually removes the necessity of the Woosung Forts having its line of fire cleared for hostilities against nonexistent foes.

Very respectfully,

J. B. MURDOCK,
Rear Admiral, U. S. Navy,
Commander in Chief, U. S. Asiatic Fleet.

AMERICAN CONSUL GENERAL,
American Consulate General, Shanghai, China.

Conclusions.—From the orders, precedents, and opinions it is evident that foreign States should refrain from interference in domestic political struggles. It is, however, incumbent upon the naval forces to afford such protection to the property and persons of nationals of their own country as may be possible without intervening in the insurrection. They are properly authorized to prevent wanton destruction of the property of nationals or other unnecessarily severe treatment which is not incident to the actual conduct of the hostilities.

Action by insurgents in the line of restraint of the freedom or restriction of the right to exercise ordinary privileges possessed by foreigners must be confined to immediate requirements. Such action can not be taken on the basis of some contingent danger which may or may not materialize.

As the merchant vessel of the United States has on board war material, the insurgents would, under the accepted principles, have the right to keep it from reaching their domestic enemy. This is a right of prevention and not a right which would authorize the insurgents to seize the war material for themselves. As Mr. Hay said in 1902:

No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents.

There is, therefore, a question as to where the line of right would run. It certainly would not allow wanton destruction or seizure. It would permit the insurgents to take the action necessary to protect themselves within the area over which they have authority.

The commander of the cruiser of the United States should endeavor to protect the rights of nationals of the United States. At the same time the interests of the United States may be more important than those of an individual. If the war material is brought to the port simply as a commercial venture, it may be easy to sell the material to the insurgents. If it is brought with view to aid the other party, the insurgents may properly demand that it be taken away or turned over to them on payment of adequate compensation.

Solution I (*c*).—The commander of the cruiser of the United States should inform the master of the merchant vessel that, while he would endeavor to prevent any wanton seizure of his cargo, he would not interfere with proper action which the insurgents might take to prevent the war material from reaching their opponents.

SOLUTION.

(*a*) The commander of the cruiser of the United States should, if possible, afford the merchant vessel the necessary protection from visit and search.

(*b*) If the only reason for the seizure of the merchant vessel is that it was about to enter a port which the insurgents have declared blockaded, the commander should grant the master's request, though the commander might require that the merchant vessel proceed to some other port.

(*c*) The commander of the cruiser of the United States should inform the master of the merchant vessel that, while he would endeavor to prevent wanton seizure of his cargo, he would not interfere with proper action which the insurgents might take to prevent the war material from reaching their opponents.

Situation II.

AIR CRAFT IN WAR.

There is war between X and Y. All other States are neutral. Airships and balloons are in common use. State X has not signed the convention prohibiting the launching of projectiles from balloons.

(*a*) X brings a balloon to State Z and fills it with gas preparatory to a flight with view to destroying a part of the fleet of Y by dropping explosives from above. The authorities of Y protest that this is a violation of neutrality. What action should be taken?

(*b*) X so maneuvers a balloon that if it is shot at, the projectile will fall within the territory of State B. What may Y do?

(*c*) An air craft of State C flies over State X in direction of State Y and easily discerns the location of the naval and military forces of State X.

What action may State X take if the air craft land on its territory?

What may be done if it does not land?

(*d*) A fleet of Y is maintaining an effective blockade before port O of State X. An aeroplane apparently from a neighboring neutral State flies over the blockading line, enters port O, lands, returns to the neutral State and later on a flight in another direction falls within the three-mile limit of State Y. The aeroplane and occupants are picked up by a vessel of the blockading force.

How should the aeroplane and occupants be treated?

(*e*) Would the treatment be different if they were picked up from the high sea?

(*f*) Would the treatment be different if they were picked up within neutral waters?

SOLUTION.

(*a*) The protest of belligerent State Y should be heeded by neutral State Z.

(*b*) Y may take any action which would not involve violation of neutral jurisdiction, as would be the case if the projectile should fall in the territory of State B.

(*c*) When the neutral air craft lands within belligerent territory it may be detained or other measures may be taken to prevent the disclosure of military movements.

While the neutral air craft is still in the air, the belligerent may take such measures as possible to prevent disclosure of his military movements.

(*d*) If the aeroplane is neutral it should be sent to a prize court for adjudication.

If the aeroplane is belligerent it may be treated as an enemy vessel taken under similar conditions.

(*e*) The treatment would be the same if picked up from the high sea.

(*f*) The belligerent would have no military rights over an aeroplane picked up in neutral waters.

NOTES.

Early recognition of military value of balloons.—During the last quarter of the eighteenth century the military value of balloons was recognized and various experiments were made. Giroud de Vilette, about 1783, wrote that from the beginning of his experiments he was convinced that the balloon would be an economical and very useful instrument for observing the position, maneuvers, march, and disposition of the enemy's forces, and for signaling this information to his own troops.

A balloon was used for observation purposes at the battle of Fleurus June 26, 1794. Balloons at the siege of Venice in 1849 were not found satisfactory for the discharge of projectiles. Balloons were used to a considerable extent during the Franco-Prussian War, and von Moltke had confidence in the military usefulness of air craft.

The captive balloon used particularly for observation and signaling purposes offers few problems as to its treatment in time of war, because the identity of the party which it serves or may serve is ordinarily easily determined. Kites and other captive air craft are subject to the same limitations.

Free balloons offer a greater number of problems because it is frequently difficult to determine whether there

is any element of hostility in a balloon which may be passing over. During the Franco-Prussian War persons who had passed the German frontier in balloons were imprisoned and severely treated, and a threat was made that they would be regarded as spies. None were, however, executed, and a few years later it came to be generally recognized that balloonists under such conditions were liable to be made prisoners of war, but were not liable to more severe treatment.

Hague conventions.—The Hague convention, with respect to the Laws and Customs of War on Land of 1899, in article 29, relating to spies, said:

> An individual can only be considered a spy if, acting clandestinely or on false pretenses, he obtains or seeks to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.
>
> Thus soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly the following are not considered spies: Soldiers or civilians carrying out their mission openly charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory.

This article was reaffirmed in the convention upon the same subject at The Hague conference of 1907. A limited use of balloons is thus permitted.

The discharge of projectiles from balloons was prohibited for a term of five years from 1899 by a declaration agreed upon at the First Hague Peace Conference. The prohibition was extended to analogous methods of discharge. When this convention came up for renewal at the Second Hague Conference in 1907 it was found that the development of the service of aerial navigation had made such progress since 1899 that States which approved the declaration of 1899 were not prepared to renew their adherence. Certain States, however, favored it, and the declaration was again submitted for approval, though only about one-half the States represented at the conference signed at the time.

A restriction on the use of balloons for bombardment of open places was, however, introduced in the Laws and Customs of War on Land. Article 25 of this convention of 1899 provided:

> The attack or bombardment of towns, villages, habitations, or buildings which are not defended is forbidden.

Article 25 of the same convention of 1907 provided:

> The attack or bombardment *by any means whatever* of towns, villages, habitations, or buildings which are not defended is forbidden.

The introduction of the clause *by any means whatever* is significant, but it must be observed that the prohibition extends only to places that are undefended and does not apply to fortified or defended positions. Accordingly, so far as the conventional laws of war are concerned, there is no prohibition of the use of balloons or other air craft for purposes of observation, scouting, and the like at any point, though doubtless neutrals have the right to regulate the use of the air space above their territories, and to exclude air craft which would use that air space for hostile purposes. There is no conventional prohibition of the use of air craft for the bombardment or attack upon fortified or defended places. The proposition of Lord Reay, of the British delegation to the Second Hague Conference in 1907 to the effect that the prohibition of aerial warfare and the restriction of warfare to land and sea would be a step in the direction of limitation of armaments did not meet with enthusiastic response.

Changed conditions since 1907.—The discussion at The Hague conference in 1907 and elsewhere at about the same time showed that on the part of many states the willingness to put restrictions on the use of air craft in time of war was due to the belief that they could not be effectively controlled. Since 1907 the progress in methods of aerial navigation has been so great that the conditions are now entirely changed. Air craft ascend to heights that were thought impossible, make flights against contrary winds, cross channels and seas, and go over mountains with such ease as to disturb well matured

war plans, are launched from and light upon decks of war ships, and in fact have become an agency which must be seriously considered in time of war.

The opposition to the use of air craft which was common before 1907 often had as its basis the contention that the use of such means in war would be at too great a risk to those who were not directly concerned in the war. It was maintained that the noncombatant population and property would be unduly endangered by the discharge of projectiles from balloons. The dirigibility of air craft recently constructed has removed many of these objections.

In case of a battle on the high sea between two fleets many of the objections to the use of air craft for the discharge of projectiles and explosives would not hold to the same degree as in land warfare.

The amount of goods which may be carried in an air craft at present is not large, but the risk to the belligerent is not always determined by volume. The character of the goods may be the essential point. Information may easily be carried which may determine the issue of a campaign.

While there has developed a considerable opposition to the exercise by air craft of ordinary war rights of attack and defense by means of projectiles it has been generally recognized that the belligerent must be able to use such force as he possesses against air craft which serve as scouts or may otherwise afford information to the enemy which may be of vastly greater importance to the enemy than any amount of material goods. The nationality of such air craft may be of importance for the court, but for the commander of the forces the main object is to prevent the furnishing of information which may defeat or upset his plans.

Position of France, 1907.—M. Renault, of the French delegation to the Second Hague Conference, speaking of the discharge of projectiles from balloons or other air craift, said:

Peu importe la mode d'envoi des projectiles. Il est licite d'essayer de détruire un arsenal, ou une caserne, que le projectile

employé dans ce but provienne d'un canon or d'un ballon; il est illicite d'essayer de détruire un hôpital par un procédé comme par l'autre. C'est là l'idée essentielle à laquelle nous estimons que l'on doit s'arrêter. Le problème de la navigation aérienne fait de tels progrès qu'il est impossible de prévoir ce que l'avenir nous réserve à ce sujet. On ne peut donc légiférer en connaissance de cause. On ne peut s'interdire d'avance la faculté de profiter de nouvelles découvertes qui ne toucheraient en rien au caractère plus ou moins humanitaire de la guerre, et qui permettraient à un belligérant d'exercer une action efficace contre son adversaire tout en respectant les prescriptions du Règlement de La Haye. (Deuxième Conférence Internationale de la Paix, Tome III, p. 152.)

The rapid development of aerial navigation has shown the wisdom of M. Renault's position in 1907. The increasing range of flight of air craft that are under control of the navigators has changed the problem of aerial warfare. Aerial corps in some form are now common adjuncts of military forces. The predictions of a few years ago in regard to the use of the air by man are in many respects more than realized. How far the use of air craft in war may be restricted by conventional agreement remains undetermined. Precedent seems to show that states are inclined to use against their enemies such force and such agencies as are under their effective control so long as these are not from their nature repugnant to the sense of humanity. Attempts were made to prohibit the use of torpedoes, submarine boats, and in earlier days firearms. In the actual effect of a projectile there may be little difference when it is fired from a gun several miles distant so as to fall within a certain area or dropped from an air craft a few hundred feet above the area. In firing upon air craft the motion of the target may be in any direction in space, while in a naval vessel the motion of the target is in the main upon a plane.

These new conditions of possible warfare show that the rules for warfare on land and on sea may not be adequate for the regulation of conduct when the extended use of the air is involved in hostilities. The changed attitude toward aerial warfare was shown in the difference in opinions of delegates to The Hague conference in 1899 and in 1907.

As Dr. Alex. Meyer, of Germany, says, in 1899 men were willing to prohibit the discharge of projectiles from balloons for a limited period, because it was felt that the lack of control of the balloon made it a cause of unnecessary danger if its use should be unrestricted. With the development of means of control of balloons and the advance in construction of dirigible air craft many of the reasons for the restriction of their use in war have disappeared.

(Die Luftschiffahrt in kriegsrechtlicher Beleuchtung, p. 13.)

Aerial navigation conferences.—The aeronautical congress held at Nancy from September 18 to 24, in 1909, expressed the wish:

1. Que les États, renonçant aux mesures prohibitives, s'entendent pour réglementer la circulation aérienne dans un sens libéral protégeant leurs droits de défense par toutes les vérifications utiles, en assurant l'observation de leurs lois douanières par des mesures appropriées à la matière, comme il a été fait pour les véhicules automobiles.

Le Congrès reconnaît que la matriculation des aéronefs serait la meilleure et peut-être la seule manière d'assurer l'efficacité d'une réglementation libérale.

2. Qu'en vue d'éviter les accidents et collisions, la circulation des navires aériens soit l'objet d'une réglementation internationale établie en s'inspirant, autant que possible, du réglement international, depuis longtemps éprouvé, relatif aux abordages en mer, et en tenant compte des règles déjà pratiquées dans la navigation aérienne.

3. Que, en raison de l'importance des connaissances météorologiques pour la navigation aérienne, la météorologie prenne une place toujours plus considérable dans l'enseignement.

(Revue Juridique Internationale Aérienne, 1ere Année, p. 33.)

Opinion of Dr. Hazeltine.—Dr. Harold D. Hazeltine, of Cambridge University, in lectures delivered late in 1910 and recently printed, touched upon some of the phases of aerial jurisdiction in time of war. His views may be stated somewhat in extenso in his own words:

In considering the rules of international law in times of war it is important to have clear ideas as to the aerial space that can legally serve as the theater of war and the base of warlike operations. It is admitted by all that the aerial space above the

territory and territorial waters of belligerents and also the aerial space above the high seas will in the future be legally the proper space for belligerent activities. A more difficult question arises with reference to the aerial space above the territory and territorial waters of neutrals. If the theory that the air is completely free be adopted, one would necessarily be obliged to admit that the entire aerial space above neutrals should also fall within the field of warlike operations. So, too, if one adopted the view that the territorial State has only a limited zone of protection above its territory, or even if the territorial State had only a limited zone of sovereignty, the logical conclusion would be that all the upper strata of the air space above the neutral's territory should be a legitimate field for the operations of the belligerent powers. But, so far as I know, all the adherents of the freedom-of-the-air position do not take this last logical step in their argument. They admit that the aerial space above neutrals should not serve as a space for the carrying on of hostilities by the belligerents. This admission on the part of the adherents of the freedom doctrine is a most important one; and, strictly speaking, I can not see in principle why they should not also admit the same considerations to apply in times of peace as in times of war. But this, of course, they do not admit! On the doctrine of the territorial State's full right of sovereignty in the entire air space above its territory and territorial waters, it is quite clear that this entire neutral air space could never serve as a space for actual hostilities between belligerents. In my opinion this latter is the sound view.

But although hostilities can not actually be carried on in neutral aerial space, a further question arises as to whether this neutral air space should be in other ways open to the use of belligerents. An examination of the present rules of maritime international law will assist us to an answer. Our fundamental question will be whether present rules of maritime international law should be adopted for future aerial international law. Present maritime international law lays down certain very important provisions favoring belligerents. It is not considered a violation of neutrality if a belligerent sea war vessel simply passes through the territorial waters of neutrals. So, too, the entry into neutral ports is not viewed as a breach of neutrality in case the entry is made for the purpose of obtaining provisions or of carrying out necessary repairs. Should these same principles apply in aerial international law?

The fact that territorial waters are in a sense a part of the sea, viewed as an international highway, lies perhaps at the basis of the rule that belligerent war vessels should have the right of passage through neutral territorial waters. Probably a distinction could be drawn between neutral territorial waters and the

neutral air space above these territorial waters, for it would undoubtedly be easy for an air vessel to pass through this narrow stretch of neutral aerial space into the air space over the neutral territory itself. The coast line itself acts as a natural and impassable barrier to sea vessels, while the invisible aerial frontier offers no such actual check. But despite this difference as regards natural conditions belligerent air vessels might well be permitted to pass through this narrow neutral aerial zone just above the coastal waters themselves.

If you think for a moment of the aerial space above the neutral territory itself, you will see that the rule to be applied here should be very different. Probably future international law will completely prohibit any passage of belligerent air vessels through the air space above the neutral territory itself. Certainly the same reasons for the present rules that prohibit the passage of belligerent troops across the territory itself should apply equally to the passage of belligerent aerial craft through the air space above that territory.

Admitting, then, that belligerent aerial craft should probably, on principle, be allowed passage through neutral air space above the neutral territorial coastal belt of water, the further question arises as to whether belligerent air vessels should be permitted actually to enter neutral harbors for purposes of asylum. Should they be permitted thus to enter for purposes of revictualing and for carrying out necessary reparations? As the sea itself is a highway for all nations, these privileges accorded to belligerent sea war vessels in neutral ports certainly seem to be based upon sound sense. Although one can conceive of various differences in detail as between the entry of belligerent sea vessels and belligerent air vessels, nevertheless it would seem just to accord the same privileges to the one class of vessels as to the other. Undoubtedly difficulties would arise in carrying out this principle, and the matter will require the most serious attention of international lawyers. It will be necessary, for example, definitely to determine how long the air vessel should remain in the neutral port, and it will be necessary to insure the strict observance of impartiality on the part of the neutral State itself. (H. D. Hazeltine, The Law of the Air, pp. 136–140.)

French opinion in 1910.—The opening words of M. Millerand, the French minister of public works, on May 18, 1910, at the International Conference upon Aerial Navigation show the rapidity of change in subjects which engage international conferences. He said:

Messeurs, Huit mois ne se sont pas écoulés depuis que j'avais l'honneur, ici même, de clôturer les travaux de la première Conférence internationale sur la circulation des automobiles, et je

prends aujourd'hui la parole pour souhaiter la bienvenue, au nom du Gouvernement de la République, aux membres éminents de la première Conférence internationale de navigation aérienne. (37 Clunet. J. D. I. P., 987.)

The French Government presented to this conference a series of propositions as bases for discussion. These prescribed the method of determining the nationality and identity of the airship, for licensing aerial pilots, for general prohibition of the carriage of arms, explosives, photographic and radiotelegraphic apparatus; for general liability to local authorities; that military and police airships could cross the frontier only after permission, and that other public airships should be assimilated to private airships, though no airship should enjoy exterritoriality. The problems before this conference were not settled, and adjournment was taken to November, 1910, but at this time some powers were unwilling to participate, and adjournment sine die took place.

The propositions which had been presented to the Institute of International Law in April, 1910, were placed before this conference. That of M. Fauchille said:

ART. 7. La circulation aérienne est libre. Néanmoins les États sous-jacent gardent les droits nécessaires à leur conservation, c'est-a-dire à leur propre sécurité et a celle des personnes et des biens de leurs habitants.

He also proposed in regard to airships that they be divided into public and private, and that the public airships might be military or civil. Each should have a nationality and identity, which should be made known. Airships might be excluded from certain zones, as from that of regions of fortifications, which regions should be made known. Navigation of the air above unoccupied territory and above the open sea was to be free. In international navigation dangerous articles and prohibited goods were not to be carried on airships. Acts on board the airship were to be within the jurisdiction of the State to which the airship belonged, while acts taking effect outside the airship are under jurisdiction of the

State within which the airship may be when the act takes places. Public airships would, so far as possible, be exempt from local jurisdiction. (17 Revue Droit International Public, p. 163, Mars–Avril, 1910.)

M. von Bar also submitted a proposition to the institute which came before the conference. He considered airships under jurisdiction of their own State so long as they remained in the air, though liable to the territorial law for any act that might take effect outside the airship. When it is not clear whether the act is criminal or civil, the law of the State of the airship prevails. The propositions of MM. Fauchille and von Bar were in many other respects supplementary. Both show how the agreement upon principles of aerial jurisdiction is progressing.

The First International Juridical Conference for the Regulation of Aerial Navigation held at Verona, from May 31 to June 2, 1910, adopted resolutions looking to the approval of much of the work of the Paris International Conference on Aerial Navigation. It maintained that the method of establishing the nationality of airships should be clearly defined, inclining to the position that the nationality of the owner should determine the nationality of the airship, that the airship would be liable for damage caused by landing, and that landing places might be prescribed. The conference regarded the aerial space above the open sea and above unoccupied territory as free; the atmosphere above the territory and the marginal sea of a State as under the jurisdiction of the subjacent State. Within the aerial domain of the State and subject to the necessary police and like regulations the navigation of the air would be free. The aircraft with its persons and goods, save for police and like regulations, would be under jurisdiction of the State to which it belongs. (17 Ibid., p. 410.)

Subcommittees of the Comité Juridique International de l'Aviation in considering a " Code de l'Air " arrived at different conclusions in 1910. The French subcommittee agreed upon the following:

ARTICLE 1er. La circulation aérienne est libre. Néanmoins les États conservent les droits nécessaires à leur defense, c'est-à-dire à leur propre sécurité et à celle des personnes et des biens de leurs habitants.

ART. 2. L'espace demeure absolument libre au-dessus de la pleine mer et des territoires inhabités.

The German committee proposed two projects, 7 members approving the first and 14 approving the second.

PROJET No. 1.—L'espace au-dessus de la haute mer et des territoires n'appartenant à personne est libre. L'espace situé au-dessus du territoire d'un Etat, y compris les mers côtières, est à envisager comme une partie du territoire de cet État.

PROJET No. 2.—L'espace au-dessus de la haute mer et des territoires n'appartenant à personne est libre. L'espace situé au-dessus du territoire d'un État (y compris les mers côtières) est à envisager comme une partie du territoire de cet État. Aucun État, cependant, ne doit, en temps de paix, interdire le passage inoffensif aux aérostats etrangers. Les événements qui se passent sur un aérostat étranger dans l'espace au-dessus, du territoire d'un autre État et qui n'intéressent pas celui-ci sont jugés d après le droit de l'État auquel l'aérostat appartient. (Revue Juridique Internationale Aèrienne 1ere Année, pp. 75–76.)

The Comité Juridique International de l'Aviation at meetings in April and May, 1910, considered the French and German propositions and agreed upon the following:

ARTICLE PREMIER.—La circulation aérienne est libre. Les États n'ont sur l'espace situé au-dessus de leur territoire, y compris les mer côtières, que les droits nécessaires pour garantir la sécurité et l'exercice des droits privés. (Ibid., p. 144.)

If the dominion of the air is in the subjacent State, this rule would establish a servitude in the air, as is the case in the general servitude in marginal seas which allows innocent passage.

The secretary of the Verona congress in 1910, Prof. Arnaldo de Valles, in an article in the July-August number, 1910, of the Revue Juridique Internationale de la Locomotion Aérienne, said:

1. La théorie de la domanialité publique de l'espace aérien est la plus conforme au régime juridique et économique actuel, soit dans le droit national, soit dans le droit international.

2. Cette théorie donne une raison scientifique au droit de police l'État et à l'exclusion des aérostats militaires des autres nations;

conclusions auxquelles on arrive dans la théorie de liberté seulement par voie empirique.

3. Une théorie de la domanialité de l'espace aérien ne restreint pas la vraie liberté qui consiste dans le droit de circulation. (Ibid., p. 208.)

National regulations.—International aerial navigation has already become a subject of domestic administrative regulation. The French minister of the interior issued a circular to the local officials on March 12, 1909, prescribing a method of action in case of landing of foreign balloons within their respective territorial divisions:

12 Mars, 1909.

Monsieur le Préfet: La fréquence des atterrissages de ballons étrangers en France a amené le gouvernement à s'occuper de cette question. Il a été reconnu que ces ballons étaient soumis au payement des droits de douane et il a été décidé en conséquence qu'il y avait lieu en pareil cas, de prendre les mesures suivantes: chaque fois qu'un ballon étranger descendra sur le territoire français, les maires, commissaires de police ou commissaires spéciaux devront vous en informer et prévenir sans retard les agents du service des douanes, s'il en existe dans le lieu d'atterrissage, ou, à leur défaut, les agents des contributions indirectes, afin d'assurer la perception des droits de douane. Le ballon devra être retenu jusqu'au payement des droits. D'autre part, les aéronautes seront tenus de décliner leur nom, prénoms, qualité et domicile. Si ce sont des militaires, ils devront indiquer le grade qu'ils occupent dans l'armée ainsi que le corps ou les services auquel ils appartiennent. En outre, les maires et les commissaires de police devront s'assurer que l'ascension a été entreprise dans un but purement scientifique et que les aéronautes ne sont livrés à aucune investigation préjudiciable à la sécurité nationale. Vous aurez soin de me transmettre ces renseignements par la voie télégraphique en m'avisant de l'atterrissage du ballon. Je vous prie de porter à la connaissance de MM. les sous-préfets, maires et commissaires de police les présentes instructions dont vous voudrez bien m'accuser réception.

Le Président du Conseil, ministre de l'intérieur,

G. Clemenceau.

In 1909 also the opinion in Denmark seemed to be that a German balloon had no right to establish in Denmark a station from which to proceed to the North Pole, and it was maintained that a state had the right to forbid airships access to any part of its territory if it judged such access prejudicial to the national interests. (16

Revue Droit International Public, p. 673, Sept.–Oct., 1909.)

There is also an undisputed legal right to regulate the movement of persons approaching fortifications, whether they approach by land, water, or air.

The use of the wireless telegraph has also been subject to national and international regulation.

Jurisdiction in subjacent State.—The Berlin agreement of 1903 and the Berlin convention of 1906 in regard to wireless telegraphy assume for the more important States of the world that jurisdiction over the atmosphere resides in the subjacent States.

The Hague conventions have prohibited by international agreement the launching of projectiles from balloons, bombardment "by any means whatever" of towns, villages, habitations, or buildings which are not defended and unneutral use of the radiotelegraph.

A dispatch of December 20, 1910, announces that Italy proposes that for time of war, by agreement by joint note, the powers of the world prohibit all firing from and arming of aerial ships, limiting their use to scouting and observation purposes only. This restriction was not made in the Turko-Italian War of 1911–12.

It is evident from the regulations issued by State authority, from decisions of courts, from codes, and expressions of State officials that States assume that they have jurisdiction in the air space above their territory.

The ideas in regard to the limits of aerial jurisdiction set forth by those who are giving special attention to this subject are not, however, in accord. It is natural that one group should maintain the ancient doctrine that "the air is free." Another group maintains that the domain of the air is exclusively in the subjacent State. A third group, between these, maintains that a certain zone of atmosphere above a State is within its jurisdiction, and beyond this the air is free. The height of this zone of jurisdiction is, however, a subject of considerable difference of opinion.

The argument has been advanced that the aerial domain of a State should be limited to a certain distance

above its territory. It has been stated that the altitude which an airship might attain can be determined, but as the limits fixed in earlier estimates have been surpassed it seems unwise to attempt at present to establish such limits.

Some think the height of the zone can be determined in a manner analogous to that of determining maritime jurisdiction. Some see unsurmountable difficulties in the use of this analogy. Of those who favor a zone theory some propose that the zone be determined by the limit of vision; some that the limit of effective control by arms be the determining factor; some that an arbitrary limit be agreed upon by the States of the world; and others advance other propositions.

It is evident that the claim can not be well sustained that the aerial dominion should be regarded as analogous to maritime, and that what is allowed in the marginal sea be allowed in a marginal zone of air, and what may be done on the high sea may be done in the aerial space above this marginal zone. While in time of war a battle between fleets upon the high sea might not endanger any neutral, a contest between their aerial fleets in the high air might result most disastrously to the subjacent neutral. In any case, while the force of gravity remains and until further means for counteracting its operation are devised, a neutral State can not be expected to submit to the risks of such use of the air. A warship upon the high sea when disabled may sink to the bottom without peril to the nearest neutral. From a battle in space above a neutral the descent of the disabled airship, possibly with a load of explosives, would certainly be with peril to the neutral. The perils to innocent neutrals because of war upon the high sea may be exceptional and almost negligible. The perils to innocent neutrals in case of war in the high air above neutral territory would be certain and grave. Indeed, the perils to those who, by the modern laws and customs of war are not liable to undue risks even within enemy territory, would give good ground for a question as to whether aerial battles above belligerent territory even should not be restricted. If

belligerents on the sea may not fight so near the coast that their shot shall fall within neutral jurisdiction, it would seem that battles in the air above neutral jurisdiction would be similarly prohibited. This would apply to the air above land and above the marginal sea, as projectiles or disabled airships would, by the universal physical law, fall toward the center of the earth when unrestrained. As, according to the law of physics, the velocity would be accelerated in proportion to the distance from which a body falls, it would on a physical basis be no less dangerous to allow a free zone at a considerable height than in a lower altitude. While on the sea it might be generally maintained that the greater the horizontal distance from the adjacent State the less probability that the act would affect the adjacent State, it could not be claimed that the greater the vertical distance from a subjacent State the less the probability that the act would affect the subjacent State. This distinctly would not be true in case of anything falling from an airship. Similarly, in observations of fortifications, photography by telescopic lenses, etc., increase of altitude may within limits give a greater range. Submarine mines for the defense of a State may not be visible from the surface of the water but may be seen from an airship.

It would seem that physical safety, military necessity, the enforcement of police, revenue, and sanitary regulations justify the claim that a State has jurisdiction in aerial space above its territory. This position also seems to underlie established domestic law and regulations, the decisions of national courts, the conclusions of international conferences, and the provisions of international conventions.

It would seem wise, therefore, to start from the premise that air above the high seas and territory that is res nullius is free, while other air is within the jurisdiction of the subjacent State "and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights," and for

these exceptions to the exclusive right of aerial jurisdiction of the subjacent State, international conferences should by agreement immediately provide.

Von Bar's proposition, 1911.—M. von Bar, after consideration of various aspects of the use of air craft in the time of war, submitted to the members of the Institute of International Law in 1911 the following rules:

Article I. En général il est interdit de se servir des aérostats, ballons or aéroplanes comme moyens de destruction ou de combat.[1]

Art. 2. Toutefois.

(*a*) Les aérostats, ballons ou aéroplanes militaire ennemis, si l'on tire sur eux (par des canons placés à terre ou à bord d'un vaisseau)[2] peuvent se défendre.

(*b*) Les combats en l'air sont permis,—

(1) S'il y a combat naval et que les aérostats, ballons ou aéroplanes ne sont éloignés que de vingt kilomètres du lieu du combat.

(2) Dans les mers territoriales des belligérants dans une zone de blocus.[3]

(3) Dans les sphères aériennes enveloppant les territoires des belligérants.

Art. 3. Il est interdit de capturer en l'air des aérostats, etc., privés ennemis, sauf les cas où ils entrent volontairement dans la sphère aérienne du territoire de l'adversaire ou dans une zone de blocus ou dans le cas de contrebande prévu par l'art. 4.

Art. 4. De même il est interdit de saisir et de confisquer des aérostats neutres ou leurs cargaisons à titre de contrebande, sauf le cas où l'on apporte immédiatement des secours à une côte ou à un port bloqué ou à l'armée ou à la flotte ennemie au théâtre de la guerre.

Art. 5. Dans les cas exceptés par les art. 4 et 5 on appliquera les règles des prises maritimes.

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[1] Peut-être on préférerait une formule conforme à celle de la convention de la Haye. Mais elle ne dirait pas tout ce qu'à mon avis il faut dire. (Cfr., art. 2.)

[2] Comme les combats en l'air, sauf les cas mentionnés dans l'art. b, sont en général interdits on ne pourra tirer sur eux que de cette manière.

[3] Comme, en général, dans les mers territoriales des belligérants les vaisseaux neutres ont le droit de libre passage ces mers ne doivent pas être rendues inaccessibles par les dangers de batailles aériennes. Autrement la navigation aérienne, même d'un pays neutre et voisin à un territoire d'un État belligérant pourrait être entravée en grande partie; par example si la France était partie belligérante et l'Angleterre neutre les aérostats anglais seraient, en passant la Manche exposés à des dangers empêchant presque toute la navigation aérienne. Voyez en comparaison, quant à sécurité de la navigation en mer comme en l'air, le projet de M. Fauchille art. 23. It faut prendre en consideration que des courants peuvent très facilement porter les aérostats dans une zone ainsi circonscrite.

ART. 6. Il est interdit aux aérostats privés ennemis de pénétrer dans la sphère aérienne de l'État adversaire.

ART. 7. Les belligérants *peuvent* interdire aux aérostats neutres de pénétrer dans la sphère aérienne de leur territoire.

ART. 8. Il est interdit de tirer sur des aérostats neutres sans avertissement préalable et de tirer sur eux si, par hasard, ils sont forcés d'atterrir.

Project before the Institute of International Law.—The project submitted to the Institute of International Law in 1911, provides:

ART. 22. Les aérostats militaires des belligérants qui pénétrent sur le territoire d'un État neutre ne doivent pas y demeurer plus de 24 heures, à moins que leus avaries ou l'état de l'atmosphere ne les empêchent de partir dans ce délai.

Si des aérostats des deux parties belligérantes se trouvent simultanément en un même point de ce territoire, il doit s'écouler au moins 24 heures entre le départ de l'aérostat d'un belligérant et le départ de l'aérostat de l'autre. L'ordre des départs est déterminé par l'ordre des arrivées, à moins que l'aérostat arrivé le premier ne soit dans le cas où la prolongation de la durée légale de séjour est admise.

Les aérostats belligérants ne doivent rien faire en territoire neutre qui puisse augmenter leur puissance militaire, et leur présence ne doit en aucune manière préjudicier a l'État neutre; les seuls actes qu'ils peuvent accomplir sont ceux que réclame l'humanité et qui leur sont indispensables pour atteindre le point le plus rapproché de leur pays ou d'un pays allié au leur pendant la guerre.

D'une manière générale, il convient d'appliquer a là guerre aérienne les principes posés par la convention de la Haye du 18 octobre 1907, concernant les droits et les devoirs des puissances neutres en cas de guerre maritime. (24 Annuaire de l'Institute de Droit International, p. 33.)

This project seems to disregard the fact that the character of aircraft is very different from that of craft that keep the sea, as the medium which supports them is also different. More stringent regulations will doubtless be necessary if neutrality is to be maintained and belligerents as to receive treatment to which they are entitled.

Action of institute, 1911.—The Institute of International Law since 1900 have given attention to various aspects of the regulation of the use of the air. The following vote was adopted at the session of the institute at Madrid in 1911:

Sur le régime juridique des aérostats.

1. Temps de paix.

1. Les aéronefs se distinguent en aéronefs publics et en aéronefs privés.

2. Tout aéronef doit avoir une nationalité, et une seule. Cette nationalité sera celle du pays où l'aéronef aura été inmatriculé. Chaque aéronef doit porter des marques spéciales de reconnaissance.

L'État auquel l'inmatriculation est demandée, détermine à quelles personnes et sous quelles conditions il peut l'accorder, la suspendre ou la retirer.

L'État qui immatricule l'aéronef d'un propriétaire étranger ne saurait toutefois prétendre à la protection de cet aéronef, sur le territoire de l'État dont relève ce propriétaire, contre l'application des lois par lesquelles cet État aurait interdit à ses nationaux de faire immatriculer leurs aéronefs à l'étranger.

3. La circulation aérienne internationale est libre, sauf le droit pour les États sous-jacents de prendre certaines mesures, à déterminer, en vue de leur propre sécurité et de celle des personnes et des biens de leurs habitants.

2. Temps de guerre.

1. La guerre aérienne est permise, mais à la condition de ne pas présenter pour les personnes ou les propriétés de la population pacifique de plus grands dangers que la guerre terrestre ou maritime. (24 Annuaire de L'Institut de Droit International, p. 346.)

Opinion of Fauchille.—Fauchille, who has given much attention to aerial domain, has recently set forth his ideas upon war in the air in his sixth edition of Bonfils, Droit International Public.

Fauchille says, in regard to the general relations of belligerents and neutrals as concerns the field of aerial warfare:

Quel peut être le théâtre de la guerre aérienne? La guerre, si elle doit nuire aux belligérants, ne peut porter atteinte aux intérêts des neutres. L'application de cette idée conduit à la règle suivante: les États belligérants ont le droit, en quelque partie que ce soit de l'atmosphère, de se livrer à des actes d'hostilité au-dessus de leur territoire continental et au-dessus de la pleine mer ou de la mer qui longe leurs côtes; il leur est, au contraire, interdit d'accomplir des actes hostiles, susceptibles d'entraîner la

chute de projectiles et d'une manière générale de causer des dommages, au-dessus du territoire continental des États neutres à quelque hauteur que ce soit, et à proximité des côtes de ces États dans un rayon déterminé par la force du canon de leurs aéronefs.

Les aéronefs militaires des belligérants, et aussi les aéronefs publics non militaires, ne peuvent, en temps de guerre comme en temps de paix, circuler au-dessus des États neutres qu'avec l'autorisation de ces États; quant aux aéronefs privés, ils n'ont besoin pour circuler d'aucune autorisation. Mais il est défendu aux uns et aux autres de séjourner au-dessus des pays neutres dans un certain rayon près des frontières de l'État ennemi, car il ne faut pas qu'ils puissent, en se tenant au-dessus de ces pays, faire des actes d'observation et d'exploration sur le territoire de l'adversaire. La circulation des aéronefs en temps de guerre est, en tout cas, soumise aux mêmes restrictions que pendant la paix; ils doivent notamment respecter les régions interdites, spécialement les ouvrages fortifiés (n° 531[6]), et s'abstenir de tous actes dommageables au pays sous-jacent. (Bonfils, Droit International Public, Fauchille's 6[e] ed., No. 1440[3].)

In general, the opinion of most writers is to extend so far as possible the principles embodied in the rules for war on land and sea to the conduct of war in which aerial domain is involved.

Opinions on use of aerial space.

But they (the belligerents) clearly do not have the right of using the aerial space surrounding the territory of neutral States (including marginal waters) for military purposes. (A. S. Hershey American Journal of International Law, vol. 6, p. 386.)

Modern law of nations allows acts of war to take place only within the territory of the belligerents or on the high seas. If air forces are allowed to engage in future wars, they, too, will have to observe this principle. They will be limited to the air domain of the belligerents and to the free parts of the air space. (Air Sovereignty—Lycklama à Nijholt, p. 65.)

The great importance of the aforesaid rule lies in its complement, which forbids acts of hostility within neutral territory, Hence the air space of neutral States will be closed to hostilities. (Ibid., p. 65.)

So passage above the neutral land can not be allowed any more than it is permitted on the soil. (Ibid., p. 67.)

In accordance with my conception of the legal nature of the air space over the different parts of the earth's surface, the belligerents can only use the air space over their own territory and over their coast waters, in addition to the air space over the open

sea, and over territory without sovereignty, and can not, on the other hand, use the air space over the territory and the coast waters of neutral States. (Die Luftschiffahrt in Kriegsrechtlicher Beleuchtung, Alex. Meyer, p. 18.)

The air space over the territory and coast waters of neutral States is, in accordance with my conception, by its legal nature, to be considered as neutral territory in every respect. Therefore not only actions which are against the interests of neutral States are prohibited, as, for instance, a battle, but in general all actions not consistent with neutrality. (Ibid., p. 20.)

This author holds that the entrance of belligerent men-of-war into neutral waters is not consistent with the neutral character of the territory, and should be prohibited, except in certain special cases, for instance, to transports carrying wounded, therefore—

In the war law of the air this basic principle must be asserted, and, therefore, during a war military airships of the belligerents, on account of the warlike nature of the act, must be prohibited both from passing through neutral air space, and also, in general, from landing in any neutral territory. (Ibid., p. 24.)

Russian regulations, 1904.—During the Russo-Japanese War of 1904–5, Russia issued among the rules to be observed:

The following actions, prohibited to neutrals, are considered as violating neutrality: The transport of the enemy's troops, its telegrams or correspondence, the supplying it of transport boats or war vessels. Vessels of neutrals found to be breaking any of these rules may be, according to circumstances, captured and confiscated. (U. S. Foreign Relations, 1904, p. 728.)

Japanese regulations, 1904.—The Japanese regulations during the Russo-Japanese War of 1904–5 provided for the capture of such vessels as "engaged in scouting or carrying information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy," and also provided for the confiscation of vessels guilty of such service.

The memoranda submitted to the international naval conference in 1908 by the 10 naval powers participating showed:

Qu'une idée commune est admise, d'après laquelle le belligérant peut poursuivre un certain nombre d'actes constituant de la part

des navires de commerce neutres une assistance donnée à l'ennemi. Il y a là une violation de la neutralité que le belligérant est en droit d'empêcher. (International Naval Conference, Parliamentary Papers, Miscellaneous No. 5 (1909), p. 106.)

Application of principles to blockade.—Whether the doctrine of freedom of the air for all navigators or the doctrine of exclusive jurisdiction in the subjacent State prevail, the question of the right of an air craft to enter a blockaded port would be an important one. Must a naval blockading force also maintain an aerial fleet in order that the blockade be binding under the principle that a blockade "to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy," as provided in the Declaration of Paris in 1856? The United States has interpreted this clause to mean that "an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port; it follows that the question of effectiveness is not controlled by the number of the blockading force." (The *Olinde Rodrigues*, 174 U. S. Sup. Ct. Repts. (1899), p. 510.)

Apparently if a blockade of a place is maintained by seagoing vessels only, it will not be dangerous for air craft to pass the line or to enter overland by making a comparatively short detour. The actual cutting off of communication with a place by means of a maritime blockade is increasingly difficult, if not impossible. As the present rules in regard to blockade are such as have developed for the maintenance of blockade by sea, it is not reasonable to expect that these rules would in all cases apply to aerial navigation.

The service which air craft can at present render to a blockaded place would largely be that of a means of communication with the outside world. Transportation of goods and persons would not commonly be by this method until aerial craft are further developed.

The case of the Atalanta.—The attitude of the learned English judge, Sir William Scott, later Lord Stowell, on the carriage of dispatches and maintenance of a means of communication with those who would be most served has

justly formed a basis for much of the later reasoning upon regulation of communication in the time of war. In the case of the *Atalanta*, in 1808, the communication involved was between a mother country and colony. The principles might apply equally well to any area with which communication is prohibited. A somewhat extended quotation from Lord Stowell's opinion shows the course of reasoning which has been approved:

> That the simple carrying of dispatches between the colonies and the mother country of the enemy is a service highly injurious to the other belligerent is most obvious. In the present state of the world, in the hostilities of *European* powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance, also, and support, because the infliction of civil distress for the purpose of compelling a surrender forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered in the contemplation of law as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up in time of peace—by ships of war or by packets in the service of the State? If a war intervenes and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy State, and is justly to be considered in that character; nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a *Charles the XIIth*, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental that, in the contemplation of human

events it is a sort of evanescent quantity of which no account is taken; and the practice has been, *accordingly*, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character as an act of the most noxious and hostile nature.

This country, which—however much its practice may be misrepresented by foreign writers, and sometimes by our own—has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offense of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, *the dispatches*, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight dependent on it, and therefore the same precise penalty can not, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle. (6 C, Robinson's Admiralty Reports, p. 440.)

The aim of the blockade is to cut off communication with the blockaded place. If one belligerent, as Lord Stowell says—

prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose (maintain communication) under the privilege of ostensible neutral character does, in fact, place himself in the service of the enemy State, and is justly to be considered in that character.

An aircraft that enters a port blockaded by water would in effect lend itself to the maintenance of communication with the area outside and would practically be in the service of the enemy. Such acts have in recent years been regarded as in the nature of unneutral service.

Jurisdiction in air space.—This situation involves the consideration of a field of relations which has not yet been completely defined. It is therefore necessary to consider the broad question of aerial jurisdiction somewhat fully, giving due weight to conditions somewhat analogous on land and sea. The air is, however, neither land nor sea, and the attempt to extend the laws of one or the other to the air would be as unfortunate in results

as an attempt to extend the laws of the land to the sea. The air is less stable and less adapted to appropriation than the sea, as the sea is less adapted to appropriation than the land. There has accordingly grown up an idea that land might be subject to ownership in the strict sense, while the sea could not be owned, but might be under the jurisdiction of a State. Rights in air space would likewise be matters which would involve the principles of jurisdiction.

Private aircraft can be more easily used for military purposes than can private marine vessels. The transfer of aircraft from neutral to belligerent control is more easy and less possible to detect. Unneutral service by aircraft would be difficult to prevent.

Undoubtedly the laws of war on land and on sea should be adapted to the aerial space so far as possible, but as the laws for land do not cover all possible contingencies which may arise at sea, so the laws of land and sea would not cover all contingencies that might arise in connection with aerial space.

Referring to the marginal sea, Ortolan says:

> L'état a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de jurisdiction, conformément aux règles de la jurisdiction internationale. (Ortolan, Diplomatie de la mer, vol. 1, Liv. II, Ch. VIII, p. 158.)

The tendency to confuse the idea of territory in the sense of land with jurisdiction has been common. The feudal system bound the State so closely with land that it was natural that land should for a time receive main consideration. The conditions necessary for State existence were gradually distinguished, and the attributes of the State as a political entity were recognized. Among these attributes one of the most important is the right to exercise jurisdiction.

As a legal concept, jurisdiction may be considered the right to exercise State authority. Story says that it may be—

> laid down as a general proposition that all persons and property within the territorial jurisdiction of a sovereign are amenable

to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. (Santissima Trinidad, 7 Wheat., 354.)

It is fully recognized that all land and the marginal sea, to a distance of a marine league at least, is subject to territorial jurisdiction, and that the open sea is not within the jurisdiction of any State, though vessels sailing upon such seas are within the jurisdiction of the State whose flag they rightfully fly. As Story says, exceptions to this rule of exclusive jurisdiction are such—

as by common usage and public policy have been allowed in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights.

The extreme theories of the freedom of the air would result in the denial of rights which existing States already consider essential to their existence as sovereign political entities.

The enlarged use of aerial space has necessarily given rise to new problems. The range of possible attack in time of war is increased if free use of the air is permitted. Scouting and similar measures take on a more important character.

The superficial frontier of a State is more easily determined than a frontier extending through aerial space.

Private rights in air space.—The question of rights in the space above the land and above the water was considered until recent years a matter of comparatively little importance, and mainly interesting to those who were engaged in weaving abstract theories.

The rights of the owner of land in the atmosphere above the land are stated in the codes of various States and in decisions of courts. Some of these rights were recognized in ancient times when the principle of State authority was not so fully developed. Individuals building out into the sea or up into the air were secured in exclusive enjoyment of the space actually occupied. (Di-

gest 1, 8, 6.) At the present time the old maxim cujus est solum ejus est usque ad coelum is subordinated to the paramount public interests, as is shown in many domestic cases involving trespass, damages, nuisance, public well-being, etc.

The Japanese Civil Code provides:

207. The ownership of land, subject to restrictions imposed by law or regulations, extends above and below the surface. (Löwhelm, translation.)

Other codes have provisions to somewhat similar effect. (Code Civil Swiss, art. 667; Dutch, art. 626; Spanish, art. 350; Austrian, sec. 297; Hungarian, sec. 569; Italian, art. 440; Portuguese, art. 2288; German, arts. 905, 906.)

While the rights of private persons in the air have received considerable definition, aerial jurisdiction and the right of State as against State have only recently become of such important practical significance as to attract international attention.

Nearly all States have in their legislation assumed exclusive right to enact regulations for the use of aerial space. This has been particularly frequent in case of the use of the air for telegraphic purposes.

Rights to game within the aerial frontiers has been repeatedly affirmed.

It is evident from decisions and laws of many States that jurisdiction over the aerial space above the State is a well-recognized attribute of the State. There are many cases in English and American decisions. The European courts have also been called upon to act. These States have assumed the right to determine the use of the superficial air and to pass upon the claims of the owners of subjacent land. The courts have generally acknowledged that certain rights resided in the owner of the subjacent land. A judgment of the New York Court of Appeals in 1906, referring to the rights of the land owner, said:

Usque ad coelum is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff, as the owner of the soil, owned upward to an indefinite extent. He owned the space occupied by the wire

and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles, and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. (Butter *v.* Frontier Telephone Co., 186 N. Y. Rep., 486.)

As States have never hesitated to make laws, to adjudicate conflicting claims, and to enforce decisions in regard to the aerial space above their territory, it would manifestly be a cause for friction to assert that this jurisdiction does not exist.

The actual practice of States has shown that jurisdiction over ships navigating the air is assumed to reside in the subjacent State. France, on March 12, 1909, through an order of the minister of the interior, directed subordinate officials to enforce customs and other regulations in case of balloons landing in French territory. (Bulletin officiel du Ministère de l'intérieur, mars 1909, p. 127.) These regulations were put in operation by customs regulations. (Annales des douanes 1er mai 1909, p. 116; 1er décembre 1909, p. 295; janvier 1910, p. 17.)

Attitude of the United States.—The United States courts have declared that the National Government has jurisdiction over the atmosphere in matters which affect the general well-being and national interests.

In the case of the Pensacola Telegraph Co. *v.* The Western Union Telegraph Co., 1878, Mr. Chief Justice Waite, in delivering the opinion of the Supreme Court of the United States, said:

Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are

successively brought into use to meet the demands of increasing population and wealth. (Cited also in Western Union Telegraph Co. *v.* State of Texas, 105 U. S., 460.)

The power of Congress would similarly extend to aerial navigation.

Mr. Justice Holmes (1908) says of the development of the idea of demarcation between public and private rights in the atmosphere, water, etc.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance can not be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. (Hudson Water Co. *v.* McCarter, 209 U. S., 349.)

Mr. Justice Holmes also in 1907 said:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

Mr. Justice Holmes also affirms that a commonwealth of the United States—

> has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests, and its inhabitants shall breathe pure air. (Georgia *v.* Tennessee Copper Co., 206 U. S., 230.)

Belligerent air craft in neutral territory.—Situation II (*a*) gives rise to the question of the rights of air craft of belligerents when in neutral territory.

Belligerent State X, brings a balloon to neutral State Z, and fills it with gas preparatory to a flight with view to destroying a part of the fleet of its enemy, State Y, by dropping explosives from above.

If the balloon is permitted to take in the gas, will it be an act of the nature which is permitted to vessels engaged in maritime war when they are permitted to coal in neutral territory? The subject of rights of coaling in neutral ports was given full consideration in 1910, International Law Situations, Situation I, pages 9–44. Previous to the Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime War, there was a growing tendency to restrict the amount of coal that might be taken in a neutral port. By article 19 of that convention, the neutral State was left the option of limiting the supply to an amount necessary to reach "the nearest home port or some nearer named neutral destination" or the neutral might permit the vessels "to take fuel necessary to fill their bunkers." Those who maintain the doctrine of an unlimited supply of fuel regard fuel simply as one form of supplies which makes navigation possible. Those who would restrict the supply regard fuel as more in the nature of war supplies. The drift of opinion as shown by The Hague regulations is toward the allowing of freedom in taking on fuel in a neutral port when not oftener than once in three months.

Even with this extension of the right of coaling, the entrance of a balloon into neutral territory may be in marked contrast to the entrance of a vessel of war into

a neutral port. One belligerent may easily learn of the entrance of a vessel of his enemy to a neutral port. The course which the vessel will follow on departure, the time of sojourn, and other facts may be reasonably determined. A vessel in a neutral port must ordinarily put to sea before reaching a home or an enemy port. A belligerent would ordinarily, therefore, have an opportunity to meet and to engage the vessel of his opponent in an area where battle is lawful and without material risk to the neutral.

It is possible, however, that the territory of States might be so situated that a neutral State might be directly between the two belligerents; e. g., if war existed between Germany and Spain. In such a case would the bringing of a war balloon to the French frontier from Germany place France under any obligation to permit the balloon to enter and take the necessary gas to make it navigable? If German balloons were permitted to enter French territory, take gas, and from points of advantage attack Spanish forces and territory, would such permission by France be analogous to the entrance of German troops, or would it be the use of French territory as a base? Whether or not the right of absolute sovereignty in the air is in the subjacent State, certainly France would be under no obligation to receive a German war balloon into its territory when France is neutral except on ground of humanity or vis major. France could scarcely permit German war balloons to use French territory as a point from which to attack Spain, and if German forces should enter French territory internment would be the penalty.

If, however, a war balloon were brought into a French port on board a German cruiser or other German public vessel, would it not be entitled to the exemptions to which the boats, launches, etc., of such vessels are entitled, and would it receive such treatment so long as it is appurtenant to the vessel? Undoubtedly the vessel would be allowed to take coal, oil, or other fuel for navigation; the launches would have similar privileges. Would the tak-

ing of gas by an air craft appurtenant to the public ship be analogous?

When the air craft appertains to the land forces The Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, would prevail. Article 2 provides that:

> Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.

Article 2 of the same convention provides for internment of troops entering neutral territory.

When the air craft belongs to the naval forces and comes into port under its own power, it may probably be allowed to take on supplies analogous to the supply of fuel for war vessels without violation of any neutral obligation. The taking of coal is often with a view to bringing the war vessel within range of the enemy. The taking of gas by a balloon might be for a similar purpose. The neutral has full right to regulate the taking of coal, as has been shown in recent wars. The neutral would have a similar right to regulate the supply of gas.

In the use of neutral land for balloons for land warfare the neutral territory becomes practically a base, and the neutral power is in reality receiving the belligerent forces into its territory, which is, according to the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Article 2, prohibited, unless internment follows.

An air craft of a belligerent that is brought, on board a war vessel, into the territorial waters of a neutral may or may not be fitted for use in war. If at the time it is not fitted for use and the neutral State allows it to make the preparations necessary to adapt it for war the State will doubtless be liable to the suspicion that its territory has been used as a base for warlike preparations.

Review of Situation II (a).—In the situation as stated the balloon is brought to neutral State Z to be filled with gas with view to a flight in order to destroy a part of the fleet of Y. This would seem to be an act in the nature

of the use of the territory of State Z as a base for warlike operations and should be forbidden.

Solution (*a*).—The protest of belligerent State Y should be heeded by neutral State Z.

Firing into neutral territory.—In Situation II (*b*), the question is raised as to what could be done if the forces of one belligerent, State X, so maneuvers a balloon that if shot at by the forces of the other belligerent, State Y, the shot will fall in the jurisdiction of neutral State B.

Unquestionably Y has a right to fire at a war balloon of State X. At the same time State B may demand that its jurisdiction be not violated.

The Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 provides, in article 1, "The territory of neutral powers is inviolable." The firing of a shot which would land in neutral territory would be a violation of neutrality and the neutral might, without offense, proceed against the party committing such violation.

That the hostilities are in such neighborhood that the risk of firing into a neutral State is present does not in any way excuse the belligerent from guarding against such action.

Solution (*b*).—Y may take any action which would not involve a violation of neutral jurisdiction, as would be the case if the projectile should fall in the territory of State B.

Jurisdiction over neutral air craft.—It is evident from Situation II (*c*) that there may be a risk to a belligerent from the flight of a neutral air craft over belligerent territory. If the jurisdiction of the air space is not in the subjacent State, the belligerent's right to control the use of the air space in the time of war would be limited. It would seem that such a claim would lead to many unfortunate complications. On the other hand, if the belligerent has jurisdiction over the air space above the territory, the Government can prescribe regulations for its use. Whether the theory that the air is free or the

theory that the jurisdiction is in the subjacent State prevails, the belligerent must have the right to regulate the use of the air space by neutrals in order that his operations may not be thwarted intentionally or unintentionally by them.

As a general rule, a belligerent must have the right to exercise such control of neutral air craft as may be necessary and possible.

In Situation II (*c*) when a neutral air craft flies over the belligerent State in such manner as to observe the disposition of its forces and in such direction as to make it possible that it may disclose this disposition to the enemy, it would be competent for the belligerent State to take such action as it was able in order to prevent the disclosure.

Opinion of Fauchille on area.—The rights of a neutral within the area of belligerent jurisdiction would naturally not extend to action which would injure the belligerent or imperil the success of his military undertakings. Fauchille says:

> En temps de guerre, les neutres pourront-ils naviguer dans les airs dominant le territoire des belligérants? Si les aéronefs privés belligérants peuvent circuler dans l'atmosphère située au-dessus des États neutres, il en est autrement des neutres vis-à-vis des belligérants: ici l'espionnage peut être à craindre non seulement à l'égard des ouvrages fortifiés, mais aussi à l'égard des mouvements et des emplacements de troupes qui, eux, sont susceptibles d'être perçus avec profit jusqu'à 10.000 mètres. Dès lors, la navigation aérienne des neutres doit être prohibée dans toutes les fractions de l'atmosphère qui domine le territoire d'un pays belligérant, ainsi que dans un rayon de 11.000 mètres à compter de ses côtes, car on peut évaluer à 1.000 mètres la portion des eaux côtières dont l'usage peut être vraiment utile à la préparation de la défense.—Certains proposent de reconnaître seulement aux États belligérants la *faculté* de défendre au-dessus de leur territoire la circulation des aéronefs des neutres.
>
> La solution qui défend aux aéronefs neutres de naviguer au-dessus et même aux alentours du territoire des belligérants rend en principe sans intérêt la question de savoir si les blocus établis d'une manière effective par un belligérant sont obligatoires pour les aéronefs neutres comme pour les navires neutres. Cette question ne pourra se poser que dans le cas assez rare où le rayon

d'action d'un blocus, tel que l'a entendu la Déclaration de Londres du 26 février 1909, est supérieur à 11.000 mètres: en pareil cas, on ne voit aucune raison de distinguer entre la navigation aérienne et la navigation maritime. (Bonfils, Droit International Public Fauchille, 6e ed., Nos. 1440[9], 1440[10].)

Solution (*c*).—When the neutral air craft lands within belligerent territory it may be detained or other measures may be taken to prevent the disclosure of military movements.

While the neutral air craft is still in the air, the belligerent may take such measures as possible to prevent disclosure of his military movements.

Résumé (*d*).—From the nature of the assured and of the probable rights of a State in the aerial space above the earth's surface where a State is exercising effective authority, it can be inferred that the aeroplane passed through a prohibited zone in entering the blockaded port.

From the nature of the service which an aeroplane is adapted to render, it may be fairly inferred that the aeroplane served as a means of communication between the blockaded port and the outside world. It would also be reasonable to presume that the aeroplane is in the service of the enemy. In such a case the liability to penalty does not cease with the delivery of the information at the blockaded port. The appearance seems to indicate that the aeroplane, if neutral, has been guilty of serving as a means of communication with the blockaded port. If the aeroplane belongs to the belligerent, it would be liable to capture in any case.

There is a possibility that the aeroplane if neutral can prove its innocence, but this is a matter for the court and not for the naval officer to determine. If the aeroplane is engaged in unneutral service, the machine is liable to confiscation, and the crew is liable to treatment as prisoners of war. (24 Annuaire de l'Institut de Droit International, p. 34, Art. 28.)

The aeroplane falls within the limits of the territorial waters of the United States, and is therefore within the

area within which the United States forces may lawfully make captures.

The commander of the vessel of the blockading fleet should, therefore, in case (*d*) send the aeroplane, if neutral, and the crew to a prize court for adjudication. If the aeroplane is belligerent, it with crew might be treated as an enemy vessel taken under similar circumstances.

Résumé (*e*).—As the right of capture on the high seas in the time of war is practically the same as the right of capture within the territorial waters of the belligerent, the treatment of the aeroplane and its occupants should be the same as if captured within the territorial waters.

Résumé (*f*).—As there is no right of capture within neutral waters, the vessel of the blockading force might be under obligation to take such measures as he was able to rescue the occupants and the aeroplane from danger, but he would do this on the ground of humanity, and would have no military rights over persons or property.

Solution (*d*).—If the aeroplane is neutral, it should be sent to a prize court for adjudication.

If the aeroplane is belligerent, it may be treated as an enemy vessel taken under similar conditions.

Solution (*e*).—The treatment would be the same if picked up from the high sea.

Solution (*f*).—The belligerent would have no military rights over an aeroplane picked up in neutral waters.

SOLUTION.

(*a*) The protest of belligerent State Y should be heeded by neutral State Z.

(*b*) Y may take any action which would not involve violation of neutral jurisdiction as would be the case if the projectile should fall in the territory of State B.

(*c*) When the neutral air craft lands within belligerent territory, it may be detained or other measures may be taken to prevent the disclosure of military movements.

While the neutral air craft is still in the air, the belligerent may take such measures as possible to prevent disclosure of his military movements.

(*d*) If the aeroplane is neutral, it should be sent to a prize court for adjudication.

If the aeroplane is belligerent, it may be treated as an enemy vessel taken under similar conditions.

(*e*) The treatment would be the same if picked up from the high sea.

(*f*) The belligerent would have no military rights over an aeroplane picked up in neutral waters.

Situation III.

CUBA NEUTRAL.

[It is granted that the Declaration of London is binding.]

There is war between the United States and State X. Other States are neutral. Supplies of the nature of conditional contraband are being carried by merchant vessels of State Y to Habana, whence they are sent by rail to Guantanamo. Cruisers of State X threaten to capture these merchant vessels. They request protection of the fleet of the United States. The commanding officer replies that he has no authority to afford protection and that any interference by the cruisers of State X would be an offense against State Y. State X maintains that Habana is essentially a hostile destination.

What position is correct?

SOLUTION.

Habana is not a hostile destination when the United States and State X are at war and other States are neutral.

The position taken by the commanding officer of the fleet of the United States is correct.

NOTES.

Acquisition of jurisdiction.—Prior to 1884 the acquisition of territorial jurisdiction was usually based on discovery, occupation, conquest, prescription, gift, exchange, or on some fact which implied the possession of sovereignty over the territory. There was also prior to 1884 a fairly well established system of protectorates, with rights of the protector and protected defined in agreements. With the expansion of the political interests of the leading States of the world into remote regions, particularly characteristic of the last 20 years of the nineteenth century, the claim to the right to exercise

jurisdiction came to be based on other grounds. Such attenuated rights as those claimed under the doctrine of the "sphere of influence" or the "sphere of interest" began to be maintained. Other methods of obtaining actual or prospective jurisdiction in smaller or weaker States were devised. The practice of leasing territory became common from the late years of the nineteenth century. Some of these leases involve absolute exclusion of the lessor State from any rights within the leased area. Other leases only confer certain specified rights upon the leaseholder. Some of the leases provide that the jurisdiction over the territory shall pass back to the lessor State in case the lessee for any reason withdraws from the territory.

Degree of protection.—The protection given a political unity by a State which owes it protection varies widely. In some instances the protected community almost loses its own identity, while in other cases the protected community is in nearly every respect equal to other States. The protection exercised may be for the good of all States and may make the development of the protected State possible. Many States are bound by treaties which limit their freedom of action in certain respects. This does not destroy their statehood. The action of the State is limited by its own will and only to the extent specified in the treaty.

Congo lease.—One of the early leases of territory was on the part of the Congo Free State to Great Britain. By an agreement of 1894 a strip of territory running along the German frontier for a considerable distance was leased to Great Britain and to be subject to British administration for a period corresponding to that during which Belgium should have control over the Congo territory. Germany maintained that an indefinite lease of this character was equivalent to a cession of the territory, and would injure her political position and interrupt her trade. The agreement with the neutralized Congo Free State was terminated by Great Britain, but apparently rather from diplomatic than from legal reasons.

In a note to Hall's International Law, appearing in the fourth edition, about this time, in 1895, the legal aspects of the Congo lease are considered:

Great Britain could only receive a lease of the territory subject to the provisions of antecedent treaties made between the Congo State and Germany, and notwithstanding a slight ambiguity in the language of the treaty made in 1884 between the two States, there can be no doubt that she would have been precluded from levying duties upon goods imported from German sources. As regards the general "political position," the Congo State is neutral, and the treaty provides that in the event of cession of any part of its territory "the obligations contracted by the association" (i. e., the Congo State) "toward the German Empire shall be transferred to the occupier." Assuming, then, for a moment that a lease of indefinite duration is equivalent to a cession, the territory leased to Great Britain would have remained affected by the duties of neutrality, and could not have been used to prejudice the position of Germany. The treaty, it should be added, contains no stipulation, express or implied, that transfer of territory in any form should be dependent on German consent. It is difficult, therefore, to understand the conventional basis of the objection taken, and of legal basis in a wider sense it is evidently destitute. The Congo State has all rights of a neutral State, of which it has not been deprived by express compact. Those rights beyond question include the right to do all State acts which neither compromise nor tend to compromise neutrality. In the particular case the Congo State was clearly competent to grant a lease, because the lease carried with it, of necessity, the obligations of neutrality. Although a lease for an indefinite time may in certain aspects be the equivalent of a cession, in law it is not so; a State may be able to make a cession of territory freed from its own obligations, but in granting a lease it can not give wider powers than it possesses itself, and consequently, altogether apart from the treaty with Germany, the Congo State could not disengage territory from neutral obligations by letting it out upon a subordinate title.

It may be remarked that the Congo State is equally competent to acquire by way of lease, because the territory so acquired can at least be invested with a neutral character at the will of the Congo State, and probably must of necessity be considered, for such time as the connection lasts, to be a temporary extension of the neutral territory (p. 96, n.)

From this discussion of the Congo lease, it is evidently the opinion that the lease can not be held to create rights which did not appertain to the territory before it was

leased, nor confer rights beyond those specified in the agreement and within the competence of the lessor State. The idea that the lease was in fact an actual alienation of the territory seems to be contrary to law and contrary to fact, though it may be that such leased territory may, at some future time, more easily pass under the actual ownership and sovereignty of the lessee. Undoubtedly it was the intention of some lessees to follow the lease by actual acquisition of sovereignty over the leased territory, but on the other hand many leases specifically state that sovereignty is not transferred, and within the last few years there has been a growing tendency, in part, perhaps, due to international jealousy, to insist that the terms of such agreements be observed strictly. While Port Arthur had been leased by China to Russia, yet after the area came within the military occupation of Japan as a result of the Russo-Japanese War, the lease did not pass in a formal manner until the consent of China was given in the treaty of Pekin in 1905.

Establishing coaling stations.—Since the importance of fuel has made necessary stations from which a convenient supply can be obtained, the States of the world possessing navies have established stations at available points. The character of these stations sometimes involves the actual cession of sovereignty over the area acquired for a fuel or naval station, or at times involves simply a right to keep a supply ship in the territorial waters of a foreign State.

In certain cases, in Asia and Africa, these coaling stations have become the centers of spheres of influence which have developed into actual territorial possessions.

In establishing these coaling or naval stations the terms of cession usually maintain that the sovereignty remains in the State which grants the station to the foreign State. It is evident that for purposes of war the responsibility for acts committed within the area must be either in the granting or in the holding State. If the responsibility is in the granting State, and that State is neutral, then the use of the area for a naval or coaling station would involve a failure to observe neutral obliga-

tions. If the responsibility is in the holding State, and that State is at war, the use of the station would be an act in the ordinary course of war, and the station would be liable to attack or to other treatment to which enemy territory might be liable. It is also evident that such treatment will be logical, as the agreements by which stations are granted look specially to a condition of war. The territory which is leased for a coaling or naval station gains no immunity from the consequences of war in which the lessee is engaged from the fact that the terms of the lease may specify that the sovereignty over the leased territory remains in the lessor. Practice in recent years has shown that, as in the case of Port Arthur leased by China, the lessor's neutrality may be recognized even when the leased territory may be the scene of hostilities.

The treatment of areas leased before the outbreak of hostilities and regularly occupied by the lease-holding State should be distinguished from a neutral port which is used as a base. As Kleen says, there are at the present time many incentives which would lead a belligerent to take advantage of a weak neutral:

> Ce n'est que de notre époque que les aides de guerre de cette catégorie ont gagné une grande importance. Après l'énorme développement des moyens d'attaque et de leurs accessoires en suite des progrès techniques, les munitions de guerre ont reçu une augmentation telle, que l'organization de dépôts de ces objets sur divers points en pays étrangers mais voisins ou situés sur le chemin pour le théâtre de la guerre peut acquérir une signification décisive pour le succès d'une armée. Et depuis que la vapeur est devenue la force motrice des flottes, la permission accordée à une grande marine militaire d'entretenir des dépôts de houille à des stations neutres intermediaires, serait, surtout sur la route qui conduirait à un ennemi éloigné, d'une valeur inestimable, en facilitant le renouvellement des moyens de locomotion et en épargnant les longs transports. Il devient d'autant plus nécessaire de maintenir le droit et le devoir des neutres de ne point accorder des permissions semblables. Sans l'interdiction, les États neutres plus faibles et possédant des ports d'escale commodes, seront exposés aux pressions des puissances maritimes en guerre prétendant aux faveurs des dépôts, au détriment de la tranquilité et de la neutralité de l'État souverain des côtes.

Le *droit* des neutres d'interdire tout dépôt par un belligérant chez eux n'a guére été révoqué en doute. Il fut déjà reconnu par les premiers auteurs du droit des gens, dans le principe établi par eux de ne tolérer sur le territoire neutre aucune démarche qui soit de nature à seconder les opérations de guerre. Mais en outre, depuis qu'une attention plus grande a été fixée sur les questions y relatives, parce qu'il y a plus de causes qu'autrefois pour la supposition qu'elles surgissent dans la pratique, la dite interdiction par les neutres leur est imposée comme un *devoir*. En effet, l'abus de leurs territoires en vue de quelque dépôt pour la guerre ferait du pays neutre un point d'appui des opérations. (Kleen, Lois et usages de la Neutralité, I, p. 487.)

United States, coaling and naval stations.—With the development of what is called world politics the acquisition of strategic positions for naval purposes has become important. To the United States this is no new idea, and the necessity for the acquisition of naval bases has been pressed home upon the United States.

President Johnson said, in his third annual message, December 3, 1867:

In our Revolutionary War ports and harbors in the West India islands were used by our enemy, to the great injury and embarrassment of the United States. We had the same experience in our second War with Great Britain. The same European policy for a long time excluded us even from trade with the West Indies, while we were at peace with all nations. In our recent Civil War the rebels and their piratical and blockade-breaking allies found facilities in the same ports for the work, which they too successfully accomplished, of injuring and devastating the commerce which we are now engaged in rebuilding. We labored especially under this disadvantage, that European steam vessels employed by our enemies found friendly shelter, protection, and supplies in West Indian ports, while our naval operations were necessarily carried on from our own distant shores. There was then a universal feeling of the want of an advanced naval outpost between the Atlantic coast and Europe. The duty of obtaining such an outpost peacefully and lawfully, while neither doing nor menacing injury to other States, earnestly engaged the attention of the executive department before the close of the war, and it has not been lost sight of since that time. A not entirely dissimilar naval want revealed itself during the same period on the Pacific coast. The required foothold there was fortunately secured by our late treaty with the Emperor of Russia, and it now seems imperative that the more obvious necessities of the Atlantic coast should not be less carefully provided for. A good and convenient port and

harbor, capable of easy defense, will supply that want. With the possession of such a station by the United States neither we nor any other American nation need longer apprehend injury or offense from any transatlantic enemy. (Richardson's Messages and Papers of the Presidents, Vol. VI, p. 579.)

Johnson's message was written at a time when events had emphasized the need of "naval outposts." In the times of quiet the same need was mentioned in the message of President Hayes, of December 6, 1880. By the treaty of 1884 with Hawaii the United States obtained the right in Pearl River Harbor "to establish and maintain there a coaling and repair station for the use of vessels of the United States."

With the upbuilding of the Navy of the United States the need of coaling and other stations became clear, and these have from time to time been acquired.

Relation of Cuba to the United States, in consequence of Spanish-American War.—In this situation the fundamental question which must be first considered is that of the relation of the Republic of Cuba to the United States.

By the treaty of December 10, 1898, "Spain relinquishes all claim of sovereignty over and title to Cuba." (Art. I.)

This provision is unlike that in regard to Porto Rico, Guam, and the Philippines which is, "Spain cedes to the United States the island of Porto Rico," etc.

Before invading Cuba the United States had formally resolved, by act of April 20, 1898—

> That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination when that is accomplished, to leave the government and control of the island to its people. (30 U. S. Stat., p. 738.)

The first resolution in this act is—

> That the people of the island of Cuba are, and of right ought to be, free and independent.

Few principles have received more complete sanction in repeated decisions than that stated by the United

States Supreme Court in the case of Jones *v.* United States in 1890:

> Who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which, by the legislative and executive departments of any government, conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances. (137 U. S. Sup. Ct. Rpts., p. 202.)

By the act of April 20, 1898, the United States had declared "that the people of the island of Cuba are, and of right ought to be, free and independent." By the treaty of December 10, 1898, Spain relinquished the claim to sovereignty over Cuba. The United States also disclaimed any disposition or intention to exercise "sovereignty, jurisdiction, or control" over Cuba except for its pacification.

As the courts are bound by the action of the legislative and executive departments, the United States did not legally obtain by the treaty that which had been formally denounced, though the Government did declare its purpose to exercise its authority for the pacification of Cuba. The Government can accordingly exercise its own judgment in deciding when pacification is accomplished. Such a state of peace and tranquillity as was sought by the United States would be advantageous to other States as well as to the United States.

Article XVI of the treaty between the United States and Spain of December 10, 1898, provides that—

> It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations.

It is thus declared that the rights of the United States under this treaty come to an end with the termination of the occupancy.

Relations of the United States and Cuba by conventional agreements.—The United States have acquired rights as regards Cuba by virtue of treaties and other

conventional agreements. Certain aspects of the relations under conventional agreements were considered in the Naval War College International Law Situations of 1907. Situation I.

Coaling and naval stations in Cuba.—The so-called "Platt amendment" of March 2, 1901, provided:

"That in fulfillment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled 'For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect,' the President is hereby authorized to 'leave the government and control of the island of Cuba to its people' so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follow:"

Among the promises defining the relations of the United States with Cuba the seventh is as follows:

"That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States." (31 U. S. Stat. L., 895.)

The articles of this amendment became an appendix to the constitution of Cuba promulgated on the 20th of May, 1902. By an agreement between the United States and Cuba, February 16–23, 1903, the Republic of Cuba leased certain areas in Guantanamo and in northern Cuba to the United States for the purposes of coaling and naval stations. In regard to Article I of this agreement, which defines the areas leased, the second and third articles of the agreement say:

"Article II.

"The grant of the foregoing article shall include the right to use and occupy the waters adjacent to said areas of land and water, and to improve and deepen the entrances thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.

"Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant.

"ARTICLE III.

"While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above-described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas, with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain, with full compensation to the owners thereof."

These areas, commonly called Guantanamo and Bahia Honda, are therefore *leased* to the United States and not *ceded.* The United States, therefore, has only a qualified jurisdiction over these regions and not sovereignty, as in Porto Rico and the Philippines, and the conditions of exercise of jurisdiction in these leased areas are accordingly unlike the conditions within the areas over which the United States exercise sovereignty.

The exercise of jurisdiction in leased areas varies according to the provisions of the lease.

By the terms of the lease between the United States and the Republic of Cuba, signed July 2, 1903:

ARTICLE I. The United States of America agrees and covenants to pay to the Republic of Cuba the annual sum of two thousand dollars, in gold coin of the United States, as long as the former shall occupy and use said areas of land by virtue of said agreement.

ART. V. Materials of all kinds, merchandise, stores and munitions of war imported into said areas for exclusive use and consumption therein shall not be subject to payment of customs duties nor any other fees or charges, and the vessels which may carry same shall not be subject to payment of port, tonnage, anchorage, or other fees, except in case said vessels shall be discharged without the limits of said areas; and said vessels shall not be discharged without the limits of said areas otherwise than through a regular port of entry of the Republic of Cuba, when both cargo and vessel shall be subject to all Cuban customs laws and regulations and payment of corresponding duties and fees.

It is further agreed that such materials, merchandise, stores and munitions of war shall not be transported from said areas into Cuban territory.

ART. VI. Except as provided in the preceding article, vessels entering into or departing from the Bays of Guantanamo and

Bahia Hondo, within the limits of Cuban territory, shall be subject exclusively to Cuban laws and authorities, and orders emanating from the latter in all that respects port police, customs or health, and authorities of the United States shall place no obstacle in the way of entrance and departure of said vessels, except in case of a state of war. (Treaties and Conventions between the United States and Other Powers, 1776–1909, Vol. I, p. 360.)

By the convention of May 22, 1903, which was proclaimed July 2, 1904, the relations of the United States and Cuba were defined according to the terms of the Platt amendment of March 2, 1901, as follows:

I. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise lodgment in or control over any portion of said island.

II. That said Government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.

III. That the Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

IV. That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

V. That the Government of Cuba will execute, and as far as necessary extend, the plans already devised, or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

VI. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

VII. That to enable the United States to maintain the independence of Cuba and to protect the people thereof, as well as

for its own defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States.

VIII. That by way of further assurance the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States. (31 U. S. Stat. L., p. 895; Treaties and Conventions, 1776–1909, Vol. I, p. 362.)

The above provisions were also embodied in the Cuban constitution of 1901, which was promulgated May 20, 1902, on which date the United States withdrew "as an intervening power." The articles contain the provisions bearing on the relations of the United States and Cuba so far as concern the international conditions under consideration.

The first article limits the right of Cuba to make compacts with foreign powers which will impair Cuban independence or to alienate control of territory.

The second article limits the power to incur indebtedness.

The third article gives the United States right to intervene to preserve Cuban independence and maintain orderly government.

Articles 4, 5, 6, and 8 have no particular bearing on the situation under consideration.

Article 7 provides for the sale or lease to the United States of lands for coaling or naval stations.

Undoubtedly the United States has by this and other agreements acquired a certain control over Cuba. The intention of the Republic of Cuba was to confine the grant of privileges and rights to the United States by a strict and narrow interpretation. The message of the President of Cuba of November 2, 1903, says—

of two formulas of grant, "sale or lease"—of portions of territory to which the United States had the right for the establishment of naval and coaling stations—the one that would least wound Cuban sentiment was accepted. Of such stations we granted the least number possible, and the conditions inserted in the convention regulating the lease of the same are so many more limitations of that grant, all favorable to the Republic of Cuba. (U. S. Foreign Relations, 1903, p. 365.)

Importation of war materials.—Article 5 of the lease of 1903 provides that supplies and munitions of war shall not be subject to customs and other dues if destined for exclusive use in the leased area and discharged therein. Discharge at other points makes such goods liable to regular customs laws.

The United States is therefore specifically prohibited the enjoyment of exceptional advantages in respect to other ports than those held under lease and has no exceptional advantages elsewhere for importation of supplies for the leased areas.

Interpretation of lease.—The legal consequences which flow from a lease are not such as follow the transfer of sovereignty. If a State, the neutrality of which is guaranteed or whose jurisdiction over a certain area is in any way qualified as a State, should lease a part of the area, the lease would carry with it only such rights as the lessor was competent to grant according to the maxim "nemo plus juris in alterum transferre protest, quam ipse habet." Such leases are, therefore, strictly construed. It is conceivable that a State which has made a lease of a part of its territory to a foreign State might go to war with the State which held the lease or it might remain neutral. In the event of neutrality, however, the leased territory under the jurisdiction of the belligerent would, according to its character, be liable to the consequences of war. If the leased territory was merely for the purpose of a scientific experiment station, a hospital, or lighthouse, it would be liable to treatment as such; if a naval base or fortification, its liability would correspond. If the lease was made in good faith and not during a war, with the purpose of furnishing the belligerent with a base, the lessor State would not be violating any obligation.

The United States in its leased territory is entitled to the privileges and bound by the obligations of the leases. In the case of Cuba certain international negotiations may be carried on by the Cuban Government without consideration of the United States. The Cuban Army may be organized in accord with Cuban desires. Cer-

tain acts which might imperil the existence of Cuba as a State may not be undertaken because prohibited by the treaty with the United States.

The Ionian Islands.—Article I of the treaty of Paris of November 5, 1815, between "Great Britain and Austria, Prussia, and Russia, respecting the Ionian Islands," provides that certain named islands "shall form a single, free, and independent State, under the denomination of the United States of the Ionian Islands."

Article II provides that—

> This State shall be placed under the mandate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors.

The remaining articles provide for the exercise of this right of protection, Article V stating:

> In order to insure, without restriction, to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which these States are placed, as well as for the exercise of the rights inherent in the said protection, His Britannic Majesty shall have the right to occupy fortresses and places of those States and to maintain garrisons in the same. The military force of the said United States shall also be under orders of the commander in chief of the troops of His Britannic Majesty.

And in Article VII:

> The trading flag of the United States of the Ionian Islands shall be acknowledged by all the contracting parties as the flag of a free and independent State. (I Hertslet, Map of Europe by Treaty, pp. 337–341.)

In 1854, during the Crimean War, while the above treaty was still in effect and Great Britain at war with Russia, certain Ionian ships were captured by British cruisers on the ground that "being British subjects they were illegally trading with the enemy." This raised the question "whether the inhabitants of the Ionian Islands were to be considered as British subjects or not." The question was elaborately argued and came before Dr. Lushington for judgment.

For the purposes of decision the vessel proceeded against was an Ionian vessel under the Ionian flag bound

for a Russian port and captured by a British cruiser. It was claimed "that as regards a power hostile to Great Britain the Ionian islanders stand in the same position as British subjects." As the Ionian Islands had not declared war, the further question arose "whether, Great Britain being at war with Russia, it follows as an inevitable consequence that the Ionian States are placed at war with Russia also. * * * Whether, Great Britain being at war with Russia, the Ionian States are ex necessitate at war also, exactly in the same way as Jersey, Guernsey, Jamaica, and Canada would be placed in hostility by a declaration of war against Great Britain by any other power." (2 Spinks, Ecclesiastical and Admiralty Reports, pp. 212, 216.) Dr. Lushington maintained that while Great Britain, as a result of her conquests in 1815, might have made a different disposition of the Ionian Islands, she did actually determine their status by the treaty of 1815, and Dr. Lushington adds that he is of the opinion that no right remained to Great Britain other than "can be found within the four corners of that treaty. * * * From this document must be derived all the rights of the contracting parties and all the rights and obligations of her Ionian States."

Dr. Lushington maintains that Great Britain by the treaty had extreme rights over the Ionian Islands. He says:

> I will now make a short summary of this treaty; it will show some of the anomalies. A single, free, and independent State, having the flag of a free and independent State—the military, naval, and diplomatic power all vested in the protecting State—the protected, not the subjects of the protector, nor British subjects, for that is perfectly clear. (Ibid., p. 220.)

Application of Dr. Lushington's reasoning.—The case of the Ionian ships offers certain parallels which make it possible to apply Dr. Lushington's reasoning to the relations between the United States and Cuba. The relations between the United States and Cuba are far less close than were those between Great Britain and the Ionian States; therefore Dr. Lushington's conclusions would in general apply more emphatically to the rela-

tions of the United States and Cuba. He maintains that war between a protecting and a foreign State does not necessarily involve the protected State in war. He further concludes that if Great Britain had a right to make a declaration of war involving the Ionian States, this could not be done without express statement; and that hostile character could not be imposed upon the protected State in absence of an agreement whose terms were not open to doubt. Dr. Lushington restored the captured property as not concerned in the war. Cuba and Cuban property in time of war between the United States and a foreign power would, according to the treaty between the United States and Cuba, be less closely related to the war than was the Ionian property in 1854.

Application of Declaration of London.—In this situation it is granted that the Declaration of London is binding. While the Declaration had not been proclaimed up to July, 1912, the principles of the Declaration were accepted by Italy as binding in the Turco-Italian War of 1911–12. The Italian attitude is shown as follows:

> By a royal decree of October 13 the following instructions were approved in conformity with the principles of the Declaration of Paris, April 16, 1856, which belligerent countries are bound to respect, with the rules of The Hague Conventions of October 18, 1907, and of the Declaration of London of February 26, 1909, which the Government of the King desires to be respected as well, so far as the provisions of the laws in force in the Kingdom allow, although they have not yet been ratified by Italy; and they will serve to regulate the conduct of naval commanders in the operations of capture and prize during the war. (Dispatch to U. S. State Dept., Oct. 19, 1911.)

From the action of Italy it may be inferred that even if not ratified the Declaration of London will be regarded as the most satisfactory available statement of the principles of international law relating to maritime capture. It is admitted in this situation that supplies of the contraband are being carried by merchant vessels of a neutral State to Habana, when they may be sent by rail to Guantanamo, which is a naval station of the United States. Under the rules prevailing in regard to continuous voyage before the Declaration of London, such a

cargo might be regarded, according to the practice of the United States, as conditional contraband, but the opposition of other States to the position of the United States led to the abandonment of this position in 1909, provided the Declaration of London should be ratified.

Article 35 of the Declaration of London and the general report upon the same shows that conditional contraband is not liable to capture under the declaration if destined for discharge in a neutral port.

ARTICLE 35.—*Conditional contraband is not liable to capture, except on board a vessel which is bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and which is not to discharge it at an intervening neutral port.*

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is met with clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

As has been said above, the doctrine of continuous voyage is excluded for conditional contrabrand. This then is liable to capture only if it is to be discharged in an enemy port. As soon as the goods are documented to be discharged in a neutral port they can not be contraband, and there is no examination as to whether they are to be forwarded to the enemy by sea or land from that neutral port. This is the essential difference from absolute contraband.

The ship's papers furnish complete proof as to the voyage of the vessel and as to the place of discharge of the cargo; it would be otherwise if the vessel were encountered having manifestly deviated from the route which she should follow according to her papers, and unable to give sufficient reasons to justify such deviation.

This rule as to the proof furnished by the ship's papers aims to prevent claims lightly raised by a cruiser and giving rise to unjustifiable captures. It must not be understood in a manner too absolute which would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea having manifestly deviated from the route which she ought to have followed, and unable to justify such deviation. The ship's papers are then contradicted by the actual facts and lose all value as evidence; the cruiser will be free to decide according to the case. In the same way, the visit and search of the vessel may reveal facts which prove in an irrefutable manner that the destination of the vessel or the place of discharge of the goods is incorrectly entered in the ship's papers. The commander of the cruiser is

then free to judge of the circumstances and captures or does not capture the vessel according to his judgment. To resume, the ship's papers are proof, unless the facts show their evidence to be false. This limitation of the value of the ship's papers as proof seems self-evident and not to need special mention. It has not been the aim to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

Because a single entry is shown to be false, it does not follow that the force of the ship's papers as evidence is nullified as a whole. The entries against which no allegation of fraud can be proved retain their value. (International Law Topics—Naval War College—1909, p. 85.)

British opinion.—Norman Bentwich, discussing the operation of article 35 from its application particularly to Great Britain, says:

But when the enemy country has ports of its own the exclusion of the doctrine of continuous voyage from the subject of conditional contraband is justified by reason of the nature of the traffic.

One might judge from the comments of some critics of the declaration that this limitation of the right to capture conditional contraband was an outrageous curtailment of our belligerent rights. Yet, in fact, we have never effectually exercised the right to capture cargoes on their way to the enemy country via neutral ports, even when they were absolute contraband; and Lord Stowell explicitly and emphatically repudiated the practice. The declaration now entitles us to do so in that contingency, but rejects the claim which has been advanced by others to capture cargoes of conditional contraband which are destined to neutral ports. It is submitted that the limitation of the right of capture is both reasonable and to our benefit. Conditional contraband cargoes are ex hypothesi such as might be regularly required by the neutral population, and it would always be possible for the consignor to direct them in the first place to a neutral consignee in the neutral country, who might forward them at a favorable opportunity to the belligerent country. And to allow capture upon suspicion that an eventual belligerent destination was intended would be an excessive interference with neutral trade, which would inevitably cause friction. Cargoes of absolute contraband, on the other hand, being of such things as are exclusively valuable in war, would probably find their way, in nine out of ten cases, from a neighboring neutral to a belligerent country; and therefore capture is allowed, though their immediate destination is seemingly innocent, when there is evidence that this is not the final destination. The effect of the restriction of capture in cases of conditional contraband would be, if we were

at war, to give immunity to all cargoes of the kind consigned to England via neutral ports, and to render them liable to capture only during their transit of the narrow seas which separate us from our continental neighbors, some of whom are in any case likely to be neutral. Hence, while the restriction would diminish our power of capturing conditional contraband destined for a continental enemy in very exceptional circumstances only, it would regularly benefit us when at war by diminishing his power of interfering with our supplies which must be brought by sea. The present practice of nations has not hitherto definitely accepted the doctrine of continuous voyage in its relation to contraband; as has been mentioned, the American courts put it into force amid protests during the Civil War, and England claimed to enforce it during the Boer War, but did not press her claim because of German opposition to it. The declaration assures us the benefit of the doctrine as belligerents in regard to absolute contraband, which is the trading by the neutral that more seriously assists in war; and it secures us both as belligerents and neutrals against any attempt by a foreign power to apply the doctrine to other neutral cargoes. (The Declaration of London, p. 75.)

Protection by the fleet of the United States.—In the proposed situation the merchant vessel of State Y which is neutral requests protection from the fleet of the United States which is belligerent. The commanding officer replies that he has no authority to afford this protection. To afford such protection would usually be outside the competence of a naval officer unless instructed or acting under treaty provisions. If the United States fleet should afford protection the act would be of the nature of belligerent convoy. A neutral vessel which accepts belligerent convoy loses her neutral character according to the present general consensus of opinion.

The neutral vessel may not itself resist visit and search, but by sailing under the protection of a belligerent there is on the part of the neutral vessel a constructive resistance which would make the vessel liable to condemnation even though otherwise innocent. It is not to be inferred that any action which the United States fleet might take in pursuing the enemy in the neighborhood or in attempting to prevent interference with commerce if in the nature of the prosecution of the war and not simply an act of convoy, would necessarily involve the merchant

vessel in any liability. As the merchant vessel might become liable to more severe treatment if accorded protection by the United States fleet and as the United States fleet could attack the enemy, in any case, if deemed at the time a proper military movement there would seem to be nothing to be gained for the United States fleet or for the merchant vessel in extending the protection requested.

Relation of State Y.—The capture of the merchant vessel of State Y which is carrying goods of the nature of conditional contraband to Habana would, as has been shown, not be justified under the provisions of the Declaration of London, which is assumed to be binding, unless Habana is regarded as a belligerent port when the United States is at war. As Cuba is an independent State in the family of nations, and as it has not made any alliance which makes it a party to a war in which the United States is involved, Cuba's relations would be those of a neutral State and Habana would be a neutral port.

Résumé.—From the consideration of the nature of leased territory it is seen that the belligerency of the lease-holding State does not affect the relations of the State which grants the lease except so far as is stated in the lease.

The jurisdiction over the leased territory is determined by the terms of the lease. A protecting State may go to war without involving the State protected in hostilities. The relations between the United States and Cuba are such that Cuba may remain neutral in a war to which the United States is a party in the same manner as Mexico might remain neutral.

The mere fact of proximity to the United States would in both cases make necessary somewhat greater care in the preservation of neutrality. Conditional contraband would not, under the declaration of London, when bound for a neutral port on a neutral vessel be liable to capture. The extension of protection to a neutral merchant vessel by a belligerent war vessel would make an innocent merchant vessel liable to penalty. It would be best to allow the neutral State to protect its own merchant ves-

sels and the interest of all States not engaged in the war would tend to cause the belligerents to respect neutral rights.

SOLUTION.

Habana is not a hostile destination when the United States and State X are at war and other States are neutral.

The position taken by the commanding officer of the fleet of the United States is correct.

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Situation IV.

STRATEGIC AREA ON HIGH SEAS.

There is war between States X and Y. Other States are neutral. A merchant vessel of the United States is proceeding to a port of State Z and is 10 miles from any land, though at that distance from the coast of State X. A cruiser of State X approaches and warns the master of the merchant vessel that he must keep farther off the coast as this water is within the strategic area which has been proclaimed by the Government of X and is closed to all vessels.

The master appeals to the commander of a cruiser of the United States to escort him through this area. The voyage would not bring the vessels within 5 miles of the coast of State X.

What should the commander do?

SOLUTION.

The commander should decline to escort the merchant vessel through the strategic area.

He should advise the master of the merchant vessel to keep clear of the strategic area.

NOTES.

Opinion of Grotius.—Grotius very early advocated some form of control by a fleet over the area which it commanded. The words of Grotius are translated by Whewell as follows:

> The empire of a portion of the sea is, it would seem, acquired in the same way as other lordship; that is, as above stated, as belonging to a person, or as belonging to a territory: Belonging to a person, when he has a fleet which commands that part of the sea; belonging to a territory, in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land. (De Jure Belli ac Pacis, L. II, c. III, sec. 2.)

Phillimore in a measure follows Grotius. He says:

> The portion of sea actually occupied by a fleet riding at anchor is within the dominion of the nation to which the fleet belongs so long as it remains there; that is, for all purposes of jurisdiction over persons within the limits of the space so occupied. The like principle is applicable to the portion of territory occupied by an army, a fleet being considered as a maritime army.
>
> This proposition is of course not to be considered without reference to the place of anchorage: A French fleet permitted to anchor in the Downs, or an English fleet at Cherbourg, would only have jurisdiction over the subjects of the respective countries which happen to be within the limits of their temporary occupation of the water. Both in the case of the fleet and the army there is, according to the theory of the law, a continuation or prorogation of the territory to which they belong. (International Law, CCIII.)

Area of war.—The area of hostilities is generally regarded as limited to the belligerent jurisdiction and the open sea. On the open sea neutrals are liable to the consequences if they enter a field in which belligerent operations are at the moment going on, e. g., come into range during an actual battle between the fleets of the opposing belligerents. Otherwise, it has been generally supposed that the high seas were free to innocent neutral vessels in the time of war as in the time of peace, though in the time of war neutral vessels might be liable to visit and search.

Blockaded area.—One of the other restrictions upon the movements of neutral vessels is imposed in the establishment of blockade. The area of operations of the blockading force is under the provisions of the declaration of London of 1909, regarded as closed to neutral vessels under risk of seizure. It is not always possible to define the limits of this area. Formerly the area was not limited under American doctrine, but a seizure might be made at any point outside of neutral jurisdiction if a vessel were bound for a blockaded port. An attempt to explain and make more definite the area was made at the International Naval Conference in 1908–9.

> Article 17. *Neutral vessels are not to be captured for breach of blockade except within the area of operations of the ships of war detailed to render the blockade effective.*

The other conditions of the liability of a vessel to capture is that she be found within the radius of action of the warships assigned to maintain the blockade effective; it is not enough that she should be on her way to the blockaded port.

As for what constitutes the *radius of action*, an explanation has been given which has been universally accepted, and which is reproduced here as furnishing the best commentary on the rule of article 17:

"When a Government decides to undertake blockading operations against some part of the enemy coast it assigns a certain number of warships to take part in the blockade, and intrusts the command of these to an officer whose duty is to insure by this means the effectiveness of the blockade. The commander of the naval force thus formed distributes the ships placed at his disposal according to the configuration of the coast and the geographical position of the blockaded places, and gives each ship instructions as to the part which she has to play, and especially as to the zone intrusted to her surveillance. It is all of the zones of surveillance together, organized in such manner that the blockade is effective, that form the radius of action of the blockading naval force.

"The radius of action so understood is closely connected with the effectiveness of the blockade, and also with the number of ships employed on it.

"Cases may occur in which a single ship will be enough to maintain a blockade effective—for instance, at the entrance of a port, or at the mouth of a river with a small estuary—on condition as circumstances allow the blockading ship to stay near enough to the entrance. In that case the radius of action is itself near the coast. But, on the contrary, if circumstances force her to remain far off, it may be that one ship would not be enough to secure effectiveness, and to maintain this it will then be necessary to add other ships. From this cause the radius of action becomes wider and more remote from the coast. It may therefore vary with circumstances and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

"It does not seem possible to assign limits to the radius of action in definite and unvarying figures any more than it is possible to fix beforehand and invariably the number of ships necessary to assure the effectiveness of any blockade. These points must be determined according to circumstances in each particular case of a blockade; perhaps it would be possible to do this at the time of the declaration.

"It is evident that a blockade will not be established in the same way on a defenseless coast and on a coast possessing all modern means of defense. There would be no question in the

latter case of applying a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places. The position would be too dangerous for the ships of the blockading force, which besides now possess more powerful means enabling them to watch effectively a much wider zone than formerly.

"The radius of action of a blockading naval force may extend somewhat far, but as it depends on the number of ships contributing to the effectiveness of the blockade and is always limited by the condition of effectiveness, it will never reach remote seas upon which merchant vessels sail which are perhaps destined for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the radius of action joined to that of effectiveness as we have tried to define it—that is to say, including the zone of operations of the blockading forces—allows the belligerent to exercise in an effective manner the right of blockade which is admitted to be his, and, on the other hand, it saves neutrals from exposure to the inconvenience of blockade at a great distance, while it leaves them free to run the risks to which they knowingly expose themselves by approaching points to which access is forbidden by the belligerent." (N. W. C. International Law Topics, 1909, pp. 49–53.)

The definition of the area of operations of a blockade even if in such manner as to include a large range of high sea is regarded as a legitimate act of war, and the belligerent right is respected. The principle which is recognized is that the belligerent has the right to put pressure upon his opponent without interference by neutrals. It is undoubtedly an inconvenience and may be a loss to neutral commerce to be excluded from the blockaded area, but it is a recognized consequence of war.

Mined areas.—Warlike operations in recent years have been extended through the use of new means of warfare. The introduction of submarine mines as a means of warfare immediately gave rise to the question of the area within which they might lawfully be used. The use of mines during the Russo-Japanese War in 1904–5 gave practical demonstration of the necessity of determining the regulation of the use of mines. Dr. Lawrence, then lecturer on international law at the British Royal Naval College, writing in 1904, when the events of the Russo-Japanese War were before the world, says:

A discussion on a moot point of neutral procedure when navigating the high seas, leads naturally to a further discussion of certain matters connected with belligerent procedure in the open waters which are part of the common highway of all nations. The question, or rather the group of questions, to which we refer grew out of the sinking of the Japanese battleship *Hatsuse* by a marine mine on May 15, when she was cruising 10 miles southeast of Port Arthur, and therefore out on the high seas a considerable distance beyond Russian territorial waters. A month before, on April 13, a Russian battleship, the *Petropavlovsk*, had been destroyed by a Japanese mine or mines. But as the catastrophe took place in the outer roadstead of Port Arthur, and at no very great distance from the shore, it was felt to be a legal, though terrible, incident of warfare. No one disputes the right of belligerents to lay mines in their own territorial waters or those of their foes as a means of strengthening the defenses of harbors or assisting attacks upon them. But when the area of destruction is extended to the high seas, questions of legality immediately arise. The sinking of the *Hatsuse* was discussed at once by the press of the civilized world. The general impression seems to have been that the Russians created a mine field in the open sea, or deliberately turned mechanical mines adrift in all the waters to which they had access. Under the impression that these views were correct, Russian methods were vehemently denounced and Russian officers charged with a gross violation of international law. In the United States the chorus of condemnation was especially loud; but the American Government wisely refrained from making representations before it was sure of the facts and instructed its naval attachés abroad to inquire into the matter.

After discussing the available information in regard to the use of these mines, Lawrence says:

We pass now from conjecture about fact to discussion about law. Immediately we find ourselves face to face with a difficulty which is serious in all legal systems, and specially serious in that which is called international law. There are no precedents. Mines are not new. They have been used on land since the introduction of gunpowder. But the first to employ them successfully at sea were the Confederates, who mined their harbors and blew up several of the attacking or blockading ships. This was in the American Civil War of 1861–1865; and since that time vast improvements have been introduced in the apparatus of submarine defense. But though mining as an art has been revolutionized, the practice of it has been confined to the ports and territorial waters of belligerent powers. The recent case is the first in which a mine acted far out at sea. How is an unprecedented situation to be met in international law? (War and Neutrality in the Far East, 2d ed., pp. 93–100.)

Prof. Holland in a letter to the Times May 23, 1904, said:

The question raised in your columns by Admiral de Horsey with reference to facts as to which we are as yet imperfectly informed well illustrates the perpetually recurring conflict between belligerent and neutral interests. They are, of course, irreconcilable, and the rights of the respective parties can be defined only by way of compromise. It is beyond doubt that the theoretically absolute right of neutral ships, whether public or private, to pursue their ordinary routes over the high seas in time of war is limited by the right of the belligerents to fight on those seas a naval battle, the scene of which can be approached by such ships only at their proper risk and peril. In such a case the neutral has ample warning of the danger to which he would be exposed did he not alter his intended course. It would, however, be an entirely different affair if he should find himself implicated in belligerent war risks, of the existence of which it was impossible for him to be informed, while pursuing his lawful business in waters over which no nation pretends to exercise jurisdiction.

It is certain that no international usage sanctions the employment by one belligerent against the other of mines or other secret contrivances which would, without notice, render dangerous the navigation of the high seas. (Letters on War and Neutrality, p. 131.)

These expressions of opinion were in accord with the ideas of the time, and it was natural that the subject of regulation of the use of mines should come before the Second Hague Conference of 1907.

That the danger to neutrals was very great is evident from a declaration of the Chinese delegate at this conference:

Le gouvernement chinois est encore aujourd'hui dans l'obligation de munir les vaisseaux de sa navigation côtière d'instruments spéciaux pour repêcher et détruire les mines flottantes qui encombrent non seulement la mer libre mais encore ses eaux territoriales. Malgré toutes les précautions prises, un nombre très considérable de navires de cabotage, de bateaux de pêche, de jonques, et de sampans a sombré par suite de rencontres avec ces mines automatiques sous-marines, et ces vaisseaux se sont perdus corps et biens sans que les details de ces désastres soient parvenus au monde occidental. Il est calculé que de cinq à six cents de nos nationaux qui vaguaient à leurs occupations pacifiques ont ainsi trouvé une mort cruelle par suite de ces engins dangereux. (Deuxième Conférence Internationale de la Paix, Tome III, p. 663.)

The discussion at The Hague in 1907 was long continued and showed great differences of opinion. The conclusions reached were not unanimous. The convention relative to the laying of automatic contact submarine mines which was at length agreed upon at The Hague covered the subject only in part. The area in which such mines may be placed is not defined, though the belligerent is "to notify the danger zone as soon as military exigencies permit," and "every possible precaution must be taken for the security of peaceful navigation." The prohibition of mines off the coast of the enemy "with the sole object of intercepting commercial navigation" would have little effect.

The Institute of International Law at Paris in 1910 proposed the following rule:

ARTICLE 1. It is forbidden to place in the open sea automatic contact mines whether or not anchored, the question of mines controlled by electricity being reserved.

It is clear that, even though as shown by the vote of the Institute of International Law in 1910, the opinion seems to be drifting toward a limitation of the area within which mines may be used, yet there is up to the present no conventional limitation.

Straits in time of war.—There have been many contentions for the maintenance by the coast state of supremacy over straits. The Danish Sound was long regarded as within the control of Denmark. The Baltic Sea was by conventional agreement closed to hostilities by other States than those bordering upon its waters. Great Britain early in the nineteenth century denied that this sea was closed to hostilities. The passage of the Bosphorus and Dardanelles has been subject to regulation, and sometimes entirely closed. The question of using submarine mines in straits was raised at the Second Hague Conference. The Dutch delegate proposed "En tous cas les détroits, qui unissent deux mers libres ne peuvent pas être barrés." (Deuxième Conference de la Paix, Tome III, p. 661.) After much discussion the committee decided to suppress provisions concerning straits

with the distinct understanding that their status was not affected by the convention relative to the laying of automatic contact submarine mines.

This convention is fully recognized as only a first step. The opinions of the delegations from some of the larger States were far from harmonious. Great Britain, generally in favor of restriction, was not averse to extending the mine field to a distance of 10 miles from the position of guns on land.

News-gathering agencies.—Another attempt to extend the area from which those not engaged in the hostilities may be excluded appears in the attempt to regulate news-gathering agencies. Correspondents were formerly taken with military expeditions as a matter of course. The dangers of such a course were not clearly evident till shown in the Spanish-American War of 1898. At that time the improved means of communication made it possible for the news of the movements of the forces, actual or contemplated, to become public in such manner as seriously to inconvenience those responsible for their success. During the Russo-Japanese War of 1904–5 the use of wireless telegraphy greatly increased the facility with which news could be sent from the area of operations or from the neighborhood. A corresponding control of the agencies for the diffusion of information is essential to the success of belligerent operations. A consideration of the physical possibilities, of the military necessities, and of the rights of the belligerents and neutrals would seem to support the conclusions of the Institute of International Law in 1906:

ART. 6. Sur la haute mer, dans la zone qui correspond à la sphère d'action de leurs opérations militaires, les belligérants peuvent empêcher les émissions d'ondes, même par une sujet neutre. (21 Annuaire de l'Institut, p. 327.)

Such a rule as the above, demanded by the necessities for effective conduct of the war, may bear heavily upon a neutral in a special case, but that the war be conducted effectively and be brought to a speedy close would be for the general advantage, and the conditions conducing to that end should prevail.

Japanese ordinance, 1904.—In accord with Imperial Ordinance No. 11, promulgated January 23, 1904, the Japanese minister of the navy, or in case of necessity a subordinate official, might designate a "defense sea area" or "strategical area" from which vessels might be excluded, even by force of arms, or within which the movements of vessels might be regulated.

IMPERIAL ORDINANCE No. 11, 1904.

[Promulgated Jan. 23, 1904.]

ORDINANCE REGARDING DEFENSE SEA AREAS.

ARTICLE 1. In case of war or emergency, the minister of the navy may, limiting an area, designate a defense sea area under this ordinance. The designation, or revocation, of such defense sea area shall be advertised by the minister of the navy.

ART. 2. In case of urgent necessity, the commander in chief of a naval station, or the commandant of a secondary naval station, may make the designation mentioned in the preceding article. In this case the designation or its revocation shall be advertised by the commander in chief or the commandant.

ART. 3. In the defense sea area, the ingress and egress and passage of any vessels other than those belonging to the army or navy are prohibited from sunset to sunrise.

ART. 4. Within the limits of naval and secondary naval ports included in a defense sea area the ingress and egress and passage of all vessels other than those belonging to the army or navy are prohibited.

ART. 5. All vessels which enter, leave, pass through, or anchor in a defense sea area shall obey the direction of the commander in chief of the naval station, or the commandant of the secondary naval station, concerned.

ART. 6. The commander in chief of a naval station, or the commandant of a secondary naval station, may, when he thinks necessary, forbid or limit within a defense sea area fishing, taking of seaweeds, or any other act considered to interfere with military operations.

ART. 7. The commander in chief of a naval station, or the commandant of a secondary naval station, may absolve vessels, which he thinks fit, from the whole or a part of the prohibitions or limitations mentioned in this ordinance.

ART. 8. Any vessel which has transgressed this ordinance, or orders issued under this ordinance, may be ordered to leave the defense sea area by a route which shall be designated.

Regarding vessels which do not obey the order mentioned in the preceding paragraph, armed force may be used when necessary.

ART. 9. The master of a vessel, or a person acting as such, which has violated any rules of articles 3 to 5, inclusive, will be punished with confinement at hard labor for not more than one year, or with a fine of not more than yen 200.

ART. 10. Persons who have violated the prohibition or limitation of article 6 will be punished with confinement at hard labor for not more than six months, or with a fine of not more than yen 100.

SUPPLEMENTARY RULE.

This ordinance takes effect from the date of promulgation.

Regulations, Japenese strategical areas, 1904–5.—The regulations governing movements of vessels within "strategical areas" varied according to the area which was under the regulation. The notification of the establishment of these areas was made in the Official Gazette. Twelve or more of such areas were established; about bays, as at Tokyo; about islands, as the Pescadores; in the neighborhood of naval stations, as Sasebo; or covering straits, as Taugaru Straits.

The minister of the United States to Japan forwarded the following on January 13, 1905, to the Secretary of State:

No. 168. AMERICAN LEGATION,
Tokyo, January 13, 1905.

SIR: I have the honor to inclose herewith a copy of a translation of the notification issued by the commander of the naval station at Mokyu, in the Pescadores, relative to navigation through the defensive sea area at Kelung.

This notification was promulgated in the Formosan Official Gazette the 24th ultimo and has just reached this legation from the consulate at Daitotei.

I have, etc.,

LLOYD GRISCOM.

INSTRUCTIONS TO VESSELS TRAVERSING THE DEFENSIVE SEA AREA AT KELUNG.

The commander of the naval station at Mokyu (Pescadores) has issued the following instructions to vessels traversing the defensive sea area at Kelung.

ARTICLE 1. Matters relating to the defensive sea area at Kelung are under the direction of the commander of the temporary Kelung submarine detachment.

ART. 2. Vessels other than those employed in the Government service or the regular mail steamers wishing to traverse the defensive sea area must first obtain permission from the commander of the temporary Kelung submarine detachment.

ART. 3. Vessels not in the service of the army or navy before passing or traversing the defensive sea area between the hours of sunset and sunrise must obtain permission from the commander of the temporary Kelung submarine detachment.

ART. 4. While passing through the defensive sea area vessels must not exceed a speed of 5 nautical miles per hour.

ART. 5. Excepting in the districts in which permission has been given by the commander of the temporary Kelung submarine detachment, fishing is prohibited within the defensive sea area.

ART. 6. In case it is deemed necessary the commander of the temporary Kelung submarine detachment may designate the anchorage for vessels or may limit or prohibit their passage or mooring for a time.

The rules governing the areas are shown by the following statements in regard to different areas:

[Inclosure 3—Translation.]

RULES TO BE OBSERVED BY VESSELS PASSING THE TOKYO BAY, HAKODATE, AND OTARU STRATEGICAL SEA AREAS—TOKYO BAY.

[Issued by the commander in chief of the Yokosuka naval station.]

ARTICLE 1. Vessels passing in or out of Tokyo Bay shall stop their course before they arrive, the former at the line connecting Chiyo-ga-saki on the south side of Uraga Harbor and Kokubo-hana of Awa Province, and the latter at the line connecting Natsu-Shima and the sea fort No. 2, and shall signal their names, make the following signals, and wait the arrival of the guide boat:

1. Steamers shall hoist the signal "want pilot," and at the same time shall repeat whistles.

2. Sailing vessels shall hoist the signal "want pilot" and blow signal horn.

ART. 2. In response to the above signals the guide boat shall hoist the "response" flag of the international signal code.

When any vessel is to be allowed freedom of movement the guide boat shall haul down the "response" flag.

ART. 3. The guide boat shall carry at its masthead the pilot flag (white upper, red lower) of the special signals to be used for British vessels as mentioned in the international signal code.

ART. 4. In passing through the area vessels shall not proceed at a speed of more than 5 knots.

ART. 5. No vessels are allowed to cast anchor in any part of the area, except in Uraga Harbor.

ART. 6. Fishing and the taking of sea weeds within the area are prohibited.

ART. 7. When necessary, passage of vessels may for a time be prohibited within the area.

ART. 8. Vessels of less than 20 tons gross or less than 200 "koku," or boats or other craft solely or mainly propelled by oars, may traverse the area without observing the provisions of article 1, subject to such restriction as may at any time be necessary.

ART. 9. Vessels passing the area at night in violation of article 7, shall do so at the risk of being fired upon by torpedo boats or patrol boats.

N. B.—The regulations for the strategical sea areas of Hakodate and of Otaru are practically the same as above.

[Inclosure 4.—Translation.]

RULES GOVERNING THE STRATEGICAL AREA AT NAGASAKI.

[Issued by the commander in chief of Sasebo.]

ARTICLE 1. Vessels which pass in, out of, or anchor in the strategical sea area shall first stop at one of the two places mentioned below, and shall receive from the guard vessel stationed for the purpose directions concerning their movements, beacons, and signals, etc.

This rule shall not apply to vessels belonging to persons living on the coast of the sea area.

ART. 2. The places where vessels are required to stop are:

1. When entering the harbor, 1 mile north of Io-jima Lighthouse.

2. When leaving the harbor, one-half mile east of Takahoko-jima.

ART. 3. The guard vessel shall be stationed near the two above-mentioned places, and shall carry at its masthead the national flag by day and two white lights abreast at night.

ART. 4. The guide boat which shall pilot vessels passing the area shall carry at its masthead the pilot flag (white upper, red lower) of special signals to be used for British vessels as given in the international signal code.

ART. 5. Fishing and the taking of seaweeds within the area are forbidden, except with the permission of the commander in chief of the naval station.

ART. 6. The sea area is under the charge of the commanding officer of the Nagasaki mining corps.

[Inclosure 5.—Translation.]

RULES GOVERNING THE KI-TAN STRAIT SEA AREA AT KOBE.

ARTICLE 1. Vessels passing the Ki-Tan Strait strategical sea area shall hoist the national flag and signal their names given in the list of merchant marine, and at night shall carry lights, as required by the rules of the road.

ART. 2. Vessels other than those belonging to the navy or army and those that have obtained permission in accordance with these regulations are prohibited from passing the area.

ART. 3. Vessels passing the area shall stop at the examination station, and after examination and inspection by the guard vessel, shall proceed, hoisting the signal required.

ART. 4. When it is deemed unnecessary to examine any vessel, and she is to be allowed freedom of movement, the guard vessel will signal the fact by hoisting the "answering" and "A" signal of the international code, and at night by showing one blue light.

ART. 5. Sailing vessels of less than 20 tons, gross, or of less than 200 "koku," and other craft principally or solely propelled by oars need not stop at the examining station unless ordered to do so.

ART. 6. Small vessels mentioned in the preceding article may fish within the area by day; but the guard vessel may prohibit them when necessary.

ART. 7. Vessels passing the area shall stop during rain or mist, when the landmarks can not be seen, until weather clears.

ART. 8. Vessels permitted to pass Ki-Tan Straits between sunset and sunrise must take the channel between Awaji and Oki-no-Shima.

ART. 9. Vessels which are compelled to pass the area at night shall apply to the commander in chief of the Kure naval station for a permit, stating the reason, certified by the local authorities.

ART. 10. The examination station is about 5 miles south of the Oki-no-Shima Lighthouse.

In several areas the boundaries seem to have run outside the 3-mile limit and even 10 miles from land seems to have been included in some instances. The straits connecting open seas were also included. It is generally held that straits connecting open seas are not to be blockaded.

Case in Russo-Japanese War.—The entrance of a vessel flying the French flag, the *Quang-nam*, to the "protected sea area" about the Pescadores Islands during the Russo-Japanese War in 1905 gave rise to a reference to

that "area." The main statement of the attorney for the petitioner was:

The steamship *Quang-nam*, being the property of the China Coast Voyage Co., located at Paris, France, runs between Saigon, Manila, Philippine Islands, Iloilo, and Cebu. According to a charter entered into between the petitioners and the above company for the use of this ship in the transportation of goods she was loaded at Saigon in the fourth month of 1905 with a cargo consisting of cases of spirits and proceeded to Kamranh Bay, where she delivered her cargo. On her voyage from Kamranh Bay to Manila by way of Hongkong and Shanghai her engine was damaged, so she steamed into the Pescadore Channel with the object of finding harbor or some other ship to get assistance for repairs. She was, however, captured by the Japanese man-of-war on the 16th of the fifth month in the above channel. This ship is a neutral ship, and both the petitioners and the charterers are neutral subjects. Besides 130 tons of coal loaded at Shanghai she took on board no contraband person or goods or letter, and the master and others did not know that the vicinity of the Pescadore Islands was the zone over which the "protected sea area" had been proclaimed. Hence, this ship should not have been captured. The written opinion of the public procurator shows that he regarded this ship as employed by the Russian Government and reconnoitering the defenses of Japan and the movements of the Japanese fleet on behalf of the enemy. * * *

The main points of the opinion of the public procurator are:

The charter party procured by the petitioners being a private document which might be prepared at any time can not be trusted. Consequently the petitioners are not parties entitled to bring this action; therefore this petition should be rejected. On the other hand, it may be inferred that this ship was chartered by the Russian Government and was engaged in reconnoitering the defenses of Japan and the movements of the Japanese fleet for the benefit of the enemy. Hence she is liable to confiscation.

After reviewing and considering the evidence the court concludes as to the *Quang-nam:*

That she purposely took a difficult passage between Formosa and the Pescadores under the pretext of going to Manila, and ran into Hatto Channel, was evidently for the purpose of reconnoitering the defenses near those islands, and the movements of the Japanese Squadron. Moreover, the fact that she took on board, at Saigon, Cardiff coal which she never before consumed, that she sailed from Kamranh Bay to Shanghai by way of Hongkong without any cargo, and that, at Shanghai no cargo was loaded, but 130 tons of Cardiff coal were taken on board when

she had more than sufficient coal for her trip to Manila; all these facts must be regarded as means taken in order to accomplish the service of reconnoitering. When a ship, though neutral, has engaged in reconnoitering defenses and the movements of a squadron for the benefit of the enemy, as this ship did, her confiscation is allowed by International Law. For the above reasons this ship should be confiscated. (Takahashi, International Law Russo-Japanese War, pp. 736–738.)

The case was carried to the higher prize court, and the judgment was sustained on the same grounds. Takahashi regards this case as under the category of unneutral service. The court considers that the vessel ran into Hatto Channel "evidently for the purpose of reconnoitering the defenses near those islands, and the movements of the Japanese Squadron." The court said that reconnoitering of this character is just ground for confiscation.

As the area about the Pescadores Islands was a "strategical area" or a "defense sea area" the presence of the ship within the area seemed to be a circumstance that weighed against its release and an evidence of unneutral service.

Résumé.—The practice, nature of regulations, and drift of opinion seem to show that in time of war a belligerent is entitled to take measures for his protection which are not unreasonable. Certainly he is entitled to regulate the use of his territorial waters in such fashion as shall be necessary for his well-being. Similarly a belligerent may be obliged to assume in time of war for his own protection a measure of control over the waters which in time of peace would be outside of his jurisdiction. It is universally admitted that if a neutral vessel is carrying contraband to his opponent, a belligerent may take the vessel to a prize court for adjudication. For such an act the course of the vessel may be changed, and it may be subjected to long delay. Would it be reasonable to contend that the course of a vessel may be changed to keep it out of a specified area because it might there obtain information which would be of vastly

greater importance to the enemy than a cargo of contraband, however noxious that might be.

SOLUTION.

The commander should decline to escort the merchant vessel through the strategic area.

He should advise the master of the merchant vessel to keep clear of the strategic area.

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Situation V.

TAKING COAL IN NEUTRAL PORT.

[It is granted in this situation that the Declaration of London is binding.]

War exists between States X and Y. Other States are neutral.

A coal dealer, K, resident at B, in neutral State Z, is known to be furnishing steaming coal of high quality.

(*a*) To coal dealers at a port of Y.

(*b*) To the Government of Y and to merchant colliers at B.

(*c*) To merchant colliers of Z which clear for a port of Y.

(*d*) To neutral merchant colliers which clear for a port of Y.

1. Under (*a*) a cruiser of X meets a cruiser of Z on the high seas escorting a collier of K toward B. The cruiser of X requests the cruiser of Z to dismiss the collier from his convoy on the ground of carriage of contraband.

What action should the cruiser of Z take?

2. Under (*b*) the Government of X requests Z to forbid naval and merchant colliers of Y to load coal of any quality in B on the ground that this makes B a base for Y.

What action should the Government take?

3. Under (*c*) the Government of X requests Z to forbid K to furnish high quality steaming coal except to neutral ships for bunker coal only.

What action should the Government take?

4. The Government of X requests Z to intern at B, a collier of Y loaded with steaming coal and about to clear for a second trip to a port of Y.

A collier of Z about to do the same.

A collier of M about to do the same.

In the cases of the colliers of Z and M unneutral service is alleged.

What action should be taken in each case?

5. A cruiser of X meets a collier of Z and a collier of M returning in ballast from a third coal-carrying trip,

since the opening of hostilities, between port B and a port of Y. The cruiser captures both colliers as being engaged in unneutral service, Z and M request the release of the colliers and indemnity.

What action should be taken?

SOLUTION.

(1) As the apparent destination of the cargo is a neutral port of Z, the commander of the cruiser of Z should not withdraw his protection unless he is reasonably certain that his confidence has been betrayed.

(2) The Government of neutral State Z should heed the request of belligerent State X as regards the naval colliers and other colliers belonging to or in the service of State Y, though there might be circumstances when it would be justifiable to allow a collier to take coal necessary for its own use, but merchant colliers may be allowed to take coal.

(3) The Government of neutral State Z is under no obligation to forbid the supply of cargo coal to neutral vessels.

(4) If the collier of belligerent State Y has entered or is sojourning in the port of neutral State Z in contravention of the regulations of State Z, the collier may be interned.

The colliers flying the merchant flag of neutral State Z or neutral State M may be guilty of unneutral service, but this does not involve State Z in any obligation to intern the colliers.

(5) The colliers should be released if their relations to the belligerent have been simply those of neutral merchant colliers. Their liability for carriage would be deposited with the cargo.

If the colliers were chartered entire by or under the orders or control of the enemy government, or otherwise engaged in unneutral service, they would be liable to detention.

NOTES.

Duty of State as to contraband.—There are some who hold the opinion that a State is under obligation not only as a political unity to refrain from all sale of contraband, but also to prevent those who are under its jurisdiction from engaging in the sale of contraband. Those

who support this contention often regard the manufacture and sale of contraband as analogous to the construction of ships to the order of one of the belligerents. Others regard the trade in contraband simply as a business venture which may yield an exceptional profit if it succeeds, or involve an exceptional loss if it fails. Of this latter point of view Kleen, who advocates State supervision of trade in war material, says:

Il n'est guère besoin de faire observer combien cette dernière manière de voir est illogique et peu digne, disons même révoltante. Parler d'une "défense," mais fermer les yeux sur son infraction; prohiber certain commerce, mais déclarer qu'il dépend du particulier de courir le risque; permettre à l'une des parties en cause d'attaquer une action qualifiée d'inoffensive en elle-même, pour pouvoir justifier la négligence du gouvernement de la réprimer; exposer enfin les neutres à des poursuites appartenant au droit de guerre, voilà, à vrai dire, autant de maximes pour le moins étranges et une méthode de réglementation peu sérieuse, qui sent singulièrement le moyen âge. C'est le hasard qui décide alors si une action peut passer librement ou non. Et encore, à supposer qu'elle soit attaquée, c'est de nouveau le hasard qui décide de la répression et de la question de savoir à quel point sera sévère l'application des moyens de la guerre.

Et cependant, cette manière nonchalante de régler une grande catégorie des devoirs de la neutralité, à savoir au moyen d'une extension du droit de la guerre aux dépens de l'ordre et de la souveraineté d'État, a prédominé partout, tant dans la doctrine que dans la marine. Pour excuser l'anomalie, qui dans ce seul rapport de la neutralité sépare le ressortissant neutre de son gouvernement pour le placer sous une souveraineté étrangère, l'on a essayé de faire valoir pendant toute notre ère cette thèse absurde, que ce n'est pas le droit international mais le belligérant qui interdit les secours de guerre par contrabande, et qu'en conséquence la seule répression qui soit nécessire est celle qui consiste dans les saisies et confiscation par le croiseurs en case de surprise. (Lois et usages de la neutralité, I, p. 380.)

Opinion of Prof. Holland, 1904.—Prof. Holland. in 1904, tried to condense the obligation of the neutral in regard to coaling and its relation to the use of territory as a base. This position showed the divergence from that of some of those who, like Kleen, would have the neutral State exercise supervision to prevent the export of

articles of contraband. Prof. Holland, in a letter to the Times, said:

As a good deal of discussion is evidently about to take place as to the articles which may be properly treated as contraband of war, and, in particular, as to coal being properly so treated, I venture to think that it may be desirable to reduce this topic (a sufficiently large one) to its true dimensions by distinguishing it from other topics with which it is too liable to be confused.

Articles are "contraband of war" which a belligerent is justified in intercepting while in course of carriage to his enemy, although such carriage is being effected by a neutral vessel. Whether any given article should be treated as contraband is, in the first instance, entirely a question for the belligerent Government and its prize court. A neutral Government has no right to complain of hardships which may thus be incurred by vessels sailing under its flag, but is bound to acquiesce in the views maintained by the belligerent Government and its courts, unless these views involve, in the language employed by Lord Granville in 1861, "a flagrant violation of international law." This is the beginning and end of the doctrine of contraband. A neutral Government has none other than this passive duty of acquiescence. Its neutrality would not be compromised by the shipment from its shores, and the carriage by its merchantmen, of any quantity of cannon, rifles, and gunpowder.

Widely different from the above are the following three topics, into the consideration of which discussions upon contraband occasionally diverge:

1. The international duty of the neutral Government not to allow its territory to become a base of belligerent operations, e. g., by the organization on its shores of an expedition, such as that which in 1828 sailed from Plymouth in the interest of Dona Maria; by the dispatch from its harbors for belligerent use of anything so closely resembling an expedition as a fully equipped ship of war (as was argued in the case of the *Alabama*); by the use of its ports by belligerent ships of war for the reception of munitions of war, or, except under strict limitations, for the renewal of their stock of coal; or by such an employment of its colliers as was alleged during the Franco-Prussian War to have implicated British merchantmen in the hostile operations of the French fleet in the North Sea. The use of the term "contraband" with reference to the failure of a neutral State to prevent occurrences of this kind is purely misleading.

2. The powers conferred upon a Government by legislation of restraining its subjects from intermeddling in a war in which the Government takes no part. Of such legislation our foreign enlistment act is a striking example. The large powers conferred by it have no commensurable relation to the duties which attach to the

position of neutrality. Its effect is to enable the Government to prohibit and punish, from abundant caution, many acts on the part of its subjects for which it would incur no international liability. It does empower the Government to prevent the use of its territory as a base, e. g., by aid directly rendered thence to a belligerent fleet; but it, of course, gives no right of interference with the export or carriage of articles which may be treated as contraband. (Letters on War and Neutrality, p. 90. The third topic relates to domestic regulation and is not printed here.)

Kleen also cites the prohibitions against trade in contraband which have been made by domestic regulations of various States. He further says that States should see that these regulations are enforced:

Le devoir d'abstention de l'État neutre est donc ici double: il doit s'abstenir lui-même, et il doit faire s'abstenir ses ressortissants. En conséquence, il est tenu: 1° de se retenir de toute mesure ou démarche par laquelle des articles de guerre seraient fournis à un belligérant; 2° d'insérer dans sa législation une défense formelle, conforme à celle du droit international, contre tout trafic de contrebande de guerre par ses sujets et sous sa juridiction; 3° de surveiller par ses organes et autorités, et en usant de toute due diligence, l'observation de la défense, et d'en réprimer les transgressions. (Lois et usages de la neutralité, I, p. 382.)

Belgian domestic regulation, 1901.—As an example of the regulations which may be established by States in time of peace and in contemplation of war may be cited the Belgian regulations of February 18, 1901.

ADMISSION DES NAVIRES DE GUERRE APPARTENANT A DES NATIONS BELLIGERANTES.

ART. 8. Les bâtiments appartenant à la marine militaire d'un État engagé dans une guerre maritime ne sont admis dans les eaux territoriales et les ports belges de la mer du Nord que pour une durée de vingt-quatre heures. Le même navire ne peut être admis deux fois dans l'espace de trois mois.

ART. 9. L'accès des eaux belges de l'Escaut est interdit, à moins d'autorisation spéciale du gouvernement, aux bâtiments de guerre appartenant à un État engagé dans une guerre maritime. Aucun pilote ne peut être fourni à ces bâtiments s'ils ne sont pas pourvus de la dite autorisation. Si l'autorisation n'a pas été obtenue par la voie diplomatique, elle doit être demandée par l'entremise du sous-inspecteur du pilotage belge à Flessingue, qui transmettra la décision au commandant du navire.

ART. 10. Sauf en cas de danger de mer, d'avaries graves, de manque de vivres ou de combustible, l'accés des eaux territoriales et ports belges de la mer du Nord est interdit aux bâtiments de guerre convoyant des prises et aux bâtiments armés en course naviguant avec ou sans prises.

ART. 11. Si des bâtiments de guerre ou des navires armés en course appartenant à une nation engagée dans une guerre maritime sont contraints de se réfugier dans les eaux ou ports belges de la mer du Nord, par suite de danger de mer, d'avaries graves, de manque de vivres ou de combustible, ils reprendront le large aussitôt que le temps le permettra ou bien dans les vingt-quatre heures qui suivront soit l'achèvement des réparations autorisées, soit l'embarquement des provisions dont la necessité aura été démontrée.

ART. 12. Le commandant de tout bâtiment de guerre d'une puissance belligérante aussitôt après son entrée dans les eaux ou ports belges de la mer du Nord sera, à l'intervention de l'administration de la marine, invité à fournir des indications précises, concernant le pavillon, le nom, le tonnage, la force des machines, l'équipage du bâtiment, son armement, le port de départ, la destination, ainsi que les autres renseignements nécessaires pour déterminer, le cas échéant, les réparations ou les approvisionnements en vivres et charbon qui pourraient être nécessaires.

ART. 13. En aucun cas, il ne peut être fourni aux bâtiments de guerre ou aux navires armés en course d'une nation engagée dans une guerre maritime des approvisionnements ou moyens de réparations au delà de la mesure indispensable pour qu'ils puissent atteindre le port le plus rapproché de leur pays ou d'un pays allié au leur pendant la guerre. Un même navire ne pourra être, sans autorisation spéciale, pourvu de charbon une seconde fois que trois mois au moins après un premier chargement dans un port belge.

ART. 14. Les bâtiments spécifiés à l'article précédent ne peuvent, à l'aide de fournitures prises sur le territoire belge, augmenter, de quelque manière que ce soit, leur matériel de guerre, ni renforcer leur équipage, ni faire des enrôlements, même parmi leurs nationaux, ni executer, sous pretexte de reparation, des travaux susceptibles d'accroître leur puissance militaire, ni débarquer pour les rapatrier par les voies de terre, des hommes, marins ou soldats se trouvant à bord.

ART. 15. Ils doivent s'abstenir de tout acte ayant pour but de faire du lieu d'asile la base d'une opération quelconque contre leurs ennemis, comme aussi de toute investigation sur les ressources, les forces et l'emplacement de leurs ennemis.

ART. 16. Ils sont tenus de se conformer aux prescriptions des articles 6 et 7 du présent arrêté et d'entretenir des relations paci-

fiques avec tous les navires, amis ou ennemis, mouillés dans le même port ou dans la même zone territoriale belge.

ART. 17. L'échange, la vente ou la cession gratuite de prises ou de butin de guerre sont interdits dans les eaux et ports belges.

ART. 18. Tout acte d'hostilité est interdit aux bâtiments de guerre étrangers dans les eaux belges.

ART. 19. Si des bâtiments de guerre ou de commerce de deux nations en état de guerre se trouvent en même temps dans un port ou dans les eaux belges, il y aura un intervalle de vingt-quatre heures au moins fixé par les autorités compétentes entre le départ d'un navire de l'un des belligérants et le départ subséquent d'un navire de l'autre belligérant. Dans ce cas, il pourra être fait exception aux prescriptions de l'article 8. La priorité de la demande assure la priorité de la sortie. Toutefois le plus faible des deux bâtiments pourra être autorisé à sortir le premier.

ART. 20. Le gouvernement se réserve la faculté de modifier les dispositions des articles 8 et suivants du present arrêté, en vue de prendre dans les cas spéciaux et si des circonstances exceptionnelles se présentent, toutes les mesures que la stricte observation de la neutralité rendrait opportunes ou nécessaires.

ART. 21. Dans le cas d'une violation des dispositions du présent arrêté, les autorités locales désignées par le gouvernement prendront toutes les mesures que les instructions spéciales leur prescrivent et elles avertiront sans délai le gouvernement qui introduira auprès des puissances étrangères les protestations et réclamations nécessaires.

DISPOSITIONS SPÉCIALES EN CAS DE MOBILISATION DE L'ARMÉE.

ART. 22. Aussitôt que la mobilisation de l'armée est décrétée, il est interdit à tous bâtiments de guerre étrangers, de mouiller dans les eaux et ports belges de la mer du Nord, sans autorisation préalable du gouvernement, sauf les cas de danger de mer, de manque d'approvisionnements ou d' avaries graves. Aucun pilote ne pourra, hors les cas de force majeure prévus ci-dessus, être fourni aux dits navires s'ils n'ont pas obtenu l'autorisation préalable requise. En ce qui concerne les eaux belges de l'Escaut, lorsque l'autorisation d'y pénétrer aura été accordée dans ces circonstances, le sous-inspecteur du pilotage belge à Flessingue préviendra le commandant du navire qu'il doit s'arrêter en vue du fort Frédéric pour communiquer cette autorisation au délégue du gouverneur militaire de la position d'Anvers, qui sera muni des instructions nécessaires. Le pavillon belge est hissé sur l'ancien fort Frédéric en un point visible pour les navires qui approchent.

DISPOSITIONS FINALES.

ART. 23. Un exemplaire du présent arrêté sera remis par les autorités maritimes au commandant de tout bâtiment de guerre

ou navire armé en course aussitôt après qu'il aura été autorisé à mouiller dans les eaux belges.

ART. 24. Nos ministres des affaires étrangères, de la guerre et des chemins de fer, postes et télégraphes sont chargés, chacun dans la limite de ses attributions de l'exécution du présent arrêté. (Revue Generale de Droit International Public, Vol. VIII, p. 343.)

Consideration of coaling.—The question of coaling within neutral jurisdiction and questions related to this have received attention at the conferences on international law at the Naval War College. Topic IV of 1906, Situation IV of 1908, and Situation I of 1910 particularly consider this question. The later discussions show that the principles set forth in The Hague Conventions allow to States preferring the liberal standard permission to grant a full bunker supply of coal within their ports.

Coaling under Situation V.—Situation V presents the matter of coaling under somewhat different conditions. Coal is under the Declaration of London of 1909, regarded as conditional contraband by article 24 (9), which mentions "fuel and lubricants" as among the "articles and materials susceptible of use in war as well as for purposes of peace," which "are without notice regarded as contraband of war, under the name of conditional contraband."

It has been suggested that coal be added to the list of absolute contraband. This action would involve article 23 of the Declaration of London.

Article 23, Declaration of London.—Article 23 of the Declaration of London and its interpretation as set forth in the general report is as follows:

ARTICLE 23. *Articles and materials exclusively used for war may be added to the list of absolute contraband by means of a notified declaration.*

The notification is addressed to the Governments of other Powers, or to their representatives accredited to the power making the declaration. A notification made after the opening of hostilities is addressed only to the neutral powers.

Certain discoveries or inventions might make the list in Article 22 insufficient. An addition may be made to it on condition that it concerns articles and materials which are *exclusively used for war*. This addition must be notified to the other powers, which

will take the measures necessary to make it known to their nationals. In theory, the notification may be made in time of peace or in time of war. Doubtless the former case will rarely occur, because a State which made such a notification might be suspected of meditating a war; it would, nevertheless, have the advantage of informing trade beforehand. There was no reason for excluding the possibility.

Some have considered excessive the right given to a power to make an addition to the list by a mere declaration. It should be noticed that this right does not present the dangers supposed. In the first place, it being understood, the declaration is operative only for the power which makes it, in the sense that the article added will be contraband only for it, as a belligerent; other States may, of course, make a similar declaration. The addition may refer only to articles *exclusively used for war;* at present it would be difficult to name any such articles not included in the list. The future is left free. If a power make claim to add to the list of absolute contraband articles not exclusively used for war, it would draw upon itself diplomatic remonstrances, because it would be disregarding an accepted rule. Besides, there would be an eventual resort to the International Prize Court. It may be supposed that the court holds that the article mentioned in the declaration of absolute contraband wrongly appears there because it is not exclusively used for war, but that it might have been included in a declaration of conditional contraband. Condemnation would then be justified if the capture was made under the conditions provided for this kind of contraband (arts. 33–35) which differ from those which apply to absolute contraband (art. 30).

It had been suggested that, in the interest of neutral trade, a period should elapse between the notification and its application. But that would be very prejudicial to the belligerent, who wishes precisely to protect himself, since during that period the trade in articles considered by him dangerous would be free and his measure would have failed of effect. Account has been taken, in another form, of the considerations of equity which have been adduced. (See art. 43.) (N. W. C. International Law Topics, 1909, pp. 61–63.)

Memoranda on provisions of article 23.—The provisions of article 23 of the Declaration of London were embodied in different forms in the memoranda submitted to the international naval conference. Examples of these show that the list of absolute contraband was not considered as finally complete:

GERMANY.

Les belligérants ont la faculté de compléter la liste de la contrebande absolue par une déclaration spéciale et notifiée. Ils ne pourront toutefois ajouter à la liste déjà existante que des objets et matériaux exclusivement faits pour servir à la guerre. (British Parliamentary Papers, International Naval Conference, Miscellaneous, No. 5 (1909), Cd., 4555, p. 59.)

UNITED STATES.

Au cas de guerre, les articles qui, conditionnellement ou sans condition, constituent de la contrebande de guerre doivent être dûment annoncés par des moyens de publicité, lorsque ces objets n'ont pas été spécifiquement mentionnés dans des traités antérieurement conclus, et encore en vigueur. (Ibid, p. 60.)

The subject is considered in a general manner in the Austro-Hungarian memorandum:

AUSTRIA-HUNGARY.

(*a*) Selon la doctrine et la pratique, seul le matériel de guerre subit, comme contrebande, la confiscation pure et simple. Quelques Puissances, il est vrai, ont également rangé parmi la contrebande dite absolue des objets de double usage. De tels objets ne sont toutefois pas considérés, généralement, comme contrebande au sens strict, leurs propriétaires étant indemnisés, d'ordinaire, par le capteur. Nombre d'auteurs remarquables restreignent même la notion de la contrebande aux objets qui, par leur nature, peuvent être considérés comme devant aider le belligérant dans les hostilités, c'est-à-dire aux armes et munitions de guerre, le commerce de tout autre article restant entièrement libre. (voir Kleen, De la contrebande de guerre, 1893, p. 288 et suiv.; Lois et usages de la Neutralité, t. 1, p. 397; de Boeck, Propriété privée ennemie sous pavillon ennemi, p. 590; Despagnet, Cour de droit international public, p. 831; Institut de droit international, avant-projet, 1896, § 3).

Or, de nos jours les belligérants ont recours, dans une mesure croissante, à toutes les branches de la production agricole et industrielle sous les formes les plus variées; pour équiper et approvisionner leurs armées gigantesques, les Puissances se trouvent forcées de se pourvoir d'une foule de choses d'un usage normalement pacifique (vivres, étoffes, matières premières, chevaux, houille). S'il paraît logique, à première vue, de déclarer contrebande de tels articles aussi bien que le matériel de guerre, il serait tout de même dangereux d'étendre, par un accord inter-

national, la notion de la contrebande au-delà du matériel de guerre proprement dit.

A pareille extension, on pourrait opposer, à plus forte raison, toutes les objections soulevées par le Délégué de la Grande-Bretagne, au cours de la 2e Conférence de la Paix, contre le principe même de la contrebande (IVe Commission, 8e séance).

Dans le cas où les Puissances ne tomberaient pas d'accord pour abolir définitivement le principe même de la contrebrande, il serait du moins fort désirable d'abandonner la contrebande dite relative.

De plus, des considérations sérieuses militent contre la notion de la contrabande absolue. D'après la doctrine généralement adoptée, la contrebande est caractérisée par le fait que le neutre, en transportant des objets propres à être employés dans la guerre, procure au destinataire un avantage sur son ennemi. A cet effect, les objets doivent tomber réellement entre ses mains. Le fait seul qu'ils sont dirigés vers l'adversaire ne suffit point pour leur imprimer le charactère hostile. Si la guerre n'a lieu que sur terre, le belligérant ne devrait donc pas confisquer de blindages ou de machines de marine; et si les objets transportés sont destinés a traverser seulement le territoire ennemi, l'entrave mise au transport ne serait guère justifiable. Peut-être dira-t-on que l'adversaire aurait à craindre, en ce cas, que l'ennemi ne s'en emparât pendant leur transit. Or, un sauf-conduit, délivré par les autorités du pays ennemi et produit par le neutre arrêté, écarterait, cette crainte.

Il s'ensuit que, en vérité, il n'existe qu'une contrebande présumable (et non pas absolu), le transport de matériel de guerre créant uniquement la présomption que les articles en route vers l'ennemi seraient employés dans la guerre. On ne saurait donc refuser aux neutres le preuve du contraire.

Quant à la détermination précise de la contrebande, il faut se demander si elle doit consister en une énumération limitative des objets de contrebande ou bien en une définition. Une définition semble être préférable. Presque tous les auteurs, notamment les écrivains anglais, rejettent, par de bonnes raisons, la "liste," puisqu'une énumération serait incomplète ou, du moins, le deviendrait bientôt. (Voir Perels, Das internationale öffentliche Seerecht, S. 238.)

Au cas où une définition de la contrebande serait adoptée, les Puissances auraient à s'abstenir de notifier, dans leurs proclamations de guerre, une liste des articles à confisquer. La Cour internationale des prises manquerait de toute base de juridiction, si l'on autorisait dorénavant les belligérants à déterminer arbitrairement les objets de contrebande. (Ibid, p. 60.)

Spain advocated the list proposed at the Second Hague Conference, 1907.

France suggested a definite list and adds:

Ainsi que tous instruments, matières ou objets quelconques susceptibles d'être utilisés pour l'armement des navires ou pour l'usage de la guerre. (Ibid., p. 61.)

Great Britain supported the list proposed at the Second Hague Conference, 1907.

Italy proposed to issue a special notification at the opening of hostilities if the list is not already agreed upon by treaty. Some States made no specific reference to the matter of adding to the list.

Russia, after enumerating the articles proposed at the Second Hague Conference, added:

Il est également interdit de transporter à l'ennemi tous les autres objets en général servant exclusivement pour l'usage de la guerre que le belligérent aura expressément déclarés comme contrebande de guerre absolue. (Ibid., p. 63.)

The committee which correlated these memoranda observed:

Le principe général étant qu'en pareille matière la raison d'être du caractère absolu de la contrebande est la nature hostile manifeste des objets, on peut se demander s'il existe actuellement des motifs s'opposant à ce que, au moyen d'une déclaration notifiée, les États, par une déclaration devant éviter les surprises, puissent ajouter à la liste de contrebande absolue d'autres articles exclusivement faits pour la guerre. (Ibid., p. 63.)

And proposed as a base of discussion:

Les articles qui sont exclusivement employés à la guerre peuvent être ajoutés à la liste de contrebande absolue au moyen d'une déclaration notifiée. (Ibid., p. 64.)

Discussion at. the naval conference.—The discussion at the naval conference of 1908–9 of the proposition to allow a power to add to the list of contraband shows how it was regarded. The Austro-Hungarian delegate asked if the belligerent had the right to publish an indefinite number of supplementary lists of absolute contraband.

M. Crowe répond que rien ne s'oppose à ce qu'on fasse plus d'une liste. Toute addition à la liste première devra cependant se borner à des objets d'un usage exclusif à la guerre. Or, la liste telle qu'elle se trouve rédigée est si complète que l'on serait

fort embarrassé d'avoir a indiquer à ce moment un article quelconque qui pût être ajouté dans les conditions posées. La faculté d'ajouter, bien loin d'être illimitée, est en effet très rigoureusement restreinte, quelque large qu'elle puisse paraître dans la théorie. (British Parliamentary Papers, International Naval Conference, Miscellaneous, No. 5 (1909), p. 135.)

Other discussion showed that it would be difficult to add to the list any article which would be solely of use for war, and additions to the list were to be restricted to articles of that character.

Situation V, 1.—Under the first hypothesis a cruiser of X, a belligerent State, meets a cruiser of Z, a neutral State, on the high seas escorting a collier with a cargo consigned to K, a merchant, resident at B, a port of neutral State Z. This merchant is furnishing steaming coal of a high quality to a port of State Y. As coal could not be regarded as absolute contraband, the cargo would be liable to seizure only in case it was shown to be really destined for the forces of State Y. The supposition under (*a*) that the coal may be taken to a port of Y is not sufficient to justify interference with the convoying vessel if the collier is in reality bound for a neutral destination. In this matter, under the Declaration of London, which for the purpose of this situation is admitted to be binding, the visiting cruiser must take the word of the commander of the public vessel of Z, which is acting as escort for the collier. That differences might arise in the opinions of the escorting and visiting officers was recognized as almost inevitable, and the general report of the declaration says:

Differences may arise between the two officers, particularly in regard to conditional contraband. The character of a port to which grain is destined may be disputed. Is it an ordinary commercial port? Is it a port which serves as a base of supply for the armed forces? The situation in fact created by the convoy must in such a case prevail. There can be on the part of the officer of the cruiser only a protest, and the difficulty will be settled through the diplomatic channel.

The situation is altogether different if a convoyed vessel is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection depends has not been fulfilled.

She has deceived her own Government and has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel, which in the ordinary way encounters and is visited and searched by a belligerent cruiser. She can not complain at being thus treated rigorously, since there is in her case an aggravation of the offense committed by a carrier of contraband. (International Law Topics, 1909, p. 143.)

It is possible that the collier may have betrayed the confidence of the commander of the escorting cruiser. The collier may have false papers, may be guilty of unneutral service, or may for other reasons not be entitled to protection. The ground of carriage of contraband would not be a sufficient reason for withdrawal of protection if the collier is actually destined for B, a port of neutral State Z.

Solution V (1).—As the apparent destination of the cargo is a neutral port of Z, the commander of the cruiser of Z should not withdraw his protection unless he is reasonably certain that his confidence has been betrayed.

Treaty of Washington.—By the rules agreed upon between the United States and Great Britain in the treaty of Washington of 1871 relative to claims arising during the American Civil War the obligations of a neutral State are set forth under Article VI as follows:

A neutral Government is bound—

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Second. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Third. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government

can not assent to the foregoing rules as a statement of the principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government has undertaken to act upon the principles set forth in these rules.

And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them.

Prof. Moore says:

As to the second rule, the Case of the United States said that it was not understood "to apply to the sale of military supplies or arms in the ordinary course of commerce," but "to the use of a neutral port by a belligerent for the *renewal* or *augmentation* of such military supplies or arms for the *naval operations* referred to in the rule." "The ports or waters of the neutral are not," continued the Case, "to be made the base of naval operations by a belligerent. Vessels of war may come and go under such rules and regulations as the neutral may prescribe; food and the ordinary stores and supplies of a ship not of a warlike charcter may be furnished without question, in quantities necessary for immediate wants; the moderate hospitalities which do not infringe upon impartiality may be extended, but no act shall be done to make the neutral port a base of operations. Ammunition and military stores for cruisers can not be obtained there; coal can not be stored there for successive supplies to the same vessel, nor can it be furnished or obtained in such supplies; prizes can not be brought there for condemnation. The repairs that humanity demands can be given, but no repairs should add to the strength or efficiency of a vessel beyond what is absolutely necessary to gain the nearest of its own ports. In the same sense are to be taken the clauses relating to the renewal or augmentation of military supplies or arms and the recruitment of men. As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent. If her magazine is supplied with powder, shot, or shells; if new guns are added to her armament; if pistols, or muskets, or cutlasses, or other implements of destruction are put on board; if men are recruited; even if, in these days when steam is a power, an excessive supply of coal is put into her bunkers the neutral will have failed in the performance of its duty." (Moore, International Arbitrations, v. 1, p. 574.)

In discussion of the subject the British Case announces:

1. A neutral government is bound to exercise due diligence to the intent that no place within its territory be made use of by either belligerent as a base or point of departure for a military or naval expedition, or for hostilities by land or sea.

2. A neutral government is not, by force of the above-mentioned obligation or otherwise, bound to prevent or restrain the sale within its territory, to a belligerent, of articles contraband of war, or the manufacture within its territory of such articles to the order of a belligerent, or the delivery thereof within its territory to a belligerent purchaser, or the exportation of such articles from its territory for sale to, or for the use of, a belligerent.

3. Nor is a neutral government bound, by force of the above-mentioned obligation or otherwise, to prohibit or prevent vessels of war in the service of a belligerent from entering or remaining in its ports or waters, or from purchasing provisions, coal, or other supplies, or undergoing repairs therein; provided that the same facilities be accorded to both belligerents indifferently; and provided also that such vessels be not permitted to augment their military force, or increase or renew their supplies of arms or munitions of war, or of men, within the neutral territory. (Ibid, p. 599.)

The award made by the Geneva tribunal states—

In order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character. (Ibid, p. 655.)

Opinion of the Institute of International Law, 1875.—The Institute of International Law considered the rules of the treaty of Washington in 1875 and adopted the following among its propositions:

IV. De même l'État neutre ne doit ni permettre ni souffrir que l'un des belligérants fasse de ses ports ou de ses eaux, la base d'opérations navales contre l'autre, ou que les vaisseaux de transport militaire se servent de ses ports ou de ses eaux, pour renouveler ou augmenter leurs approvisionnements militaires ou leurs armes ou pour recruter des hommes. (1 Annuaire, 1875, p. 139.)

Brazilian proclamation, 1898.—The proclamation issued by Brazil during the Spanish-American War of 1898

provides more than usual in detail for the conduct of belligerent vessels in Brazilian ports.

VIII. No ship with the flag of one of the belligerents employed in the war, or destined for the same, may be provisioned, equipped, or armed in the ports of the Republic, the furnishing of victuals and naval stores which it may absolutely need and the things indispensable for the continuation of its voyage not being included in this prohibition.

IX. The last provision of the preceding section presupposes that the ship is bound for a certain port, and that it is only en route and puts into a port of the Republic through stress of circumstances. This, moreover, will not be considered as verified if the same ship tries the same port repeated times, or after having been relieved in one port should subsequently enter another, under the same pretext, except in proven cases of compelling circumstances. Therefore, repeated visits without a sufficiently justified motive would authorize the suspicion that the ship is not really en route, but is frequenting the seas near Brazil in order to make prizes of hostile ships. In such cases asylum or succor given to a ship would be characterized as assistance or favor given against the other belligerent, being thus a breach of neutrality.

Therefore, a ship which shall once have entered one of our ports shall not be received in that or another shortly after having left the first, in order to take victuals, naval stores, or make repairs, except in a duly proved case of compelling circumstances, unless after a reasonable interval which would make it seem probable that the ship had left the coast of Brazil and had returned after having finished the voyage she was undertaking.

X. The movements of the belligerent will be under the supervision of the customs authorities from the time of entrance until that of departure for the purpose of verifying the proper character of the things put on board.

XI. The ships of belligerents shall take material for combustion only for the continuance of their voyage.

Furnishing coal to ships which sail the seas near Brazil for the purpose of making prizes of an enemy's vessels or prosecuting any other kind of hostile operations is prohibited.

A ship which shall have once received material for combustion in our ports shall not be allowed a new supply there unless there shall have elapsed a reasonable interval which makes it probable that said ship has returned after having finished its voyage to a foreign port.

XII. It will not be permitted to either of the belligerents to receive in the ports of the Republic goods coming directly for them in the ships of any nation whatever.

This means that the belligerents may not seek ports en route and on account of an unforeseen necessity, while having the intention of remaining in the vicinity of the coasts of Brazil, taking thus beforehand the necessary precautions to furnish themselves with the means of continuing their enterprises. The tolerance of such an abuse would be equivalent to allowing our ports to serve as a base of operations for the belligerents. (U. S. Foreign Relations, 1898, p. 847.)

These same rules were regarded by Brazil as operative in 1904. (U. S. Foreign Relations, 1904, p. 16.)

Question at The Hague, 1907.—The matter of the use of territory as a base received considerable attention at the Second Hague Conference in 1907.

In the questionnaire proposed in annex 49 by the subcommittee it is asked:

III. Dans quelle mesure doit-il être interdit aux navires de guerre des belligérants d'utiliser les ports neutres et les eaux territoriales?

Lieu d'observation.

Rendez-vous.

Passage.

Base d'opérations de guerre.

Constitution d'un tribunal de prises.

Buts militaires de toute nature. (Deuxième Conférence de la Paix, Tome III, p. 705.)

The replies to this question, particularly as relate to the use of the territory of a neutral as a base, show some difference as to the degree of stringency of proposed rules and ideas as to what constitute a base.

SPAIN.

ARTICLE 1. Il ne sera pas permis aux vaisseaux de guerre d'entrer ou de séjourner dans les ports ou les eaux neutres, en les prenant comme bases d'opérations de guerre, quelle que soit la nature de ces opérations.

GREAT BRITAIN.

(9) Un État neutre devra empêcher, dans la mesure du possible, qu'une partie de son territoire ou de ses eaux territoriales ne serve de base d'opérations à une flotte belligérante.

(10) Un territoire neutre ou des eaux territoriales neutres seront considérés comme servant de base d'opérations à un belligérant lorsque, entre autres:

(*a*) Il a été installé sur le territoire neutre ou à bord d'un navire dans les eaux neutres une station radio-télégraphique ou tout autre appareil destiné à maintenir la communication avec les navires de guerre du belligérant.

(*b*) Les navires belligérants se feront ravitailler dans les eaux neutres par des vaisseaux auxiliaires de leur flotte.

JAPAN.

(1) Il est interdit aux navires belligérants de se servir des ports et des eaux neutres soit comme lieu d'observations ou de rendez-vous, soit comme bases d'opérations de guerre ou de buts militaires de toute nature.

RUSSIA.

(3) Est également interdit aux dits bâtiments de se servir des ports et des eaux territoriales neutres comme de bases d'opérations de guerre. (Ibid., pp. 705, 706.)

Another question was also proposed which related to the subject of the amount of coal which could be taken.

XII. Dans quelle mesure pourront-ils s'y approvisionner de vivres et de charbon?

To this question several States replied.

SPAIN.

ART. 5. Les vaisseaux belligérants ne pourront, pendant leur séjour dans les ports ou les eaux neutres, charger du matériel de guerre, ni aucun approvisionnement de nature à augmenter leur force militaire. Ils pourront toutefois, se pourvoir des vivres et du charbon nécessaires pour atteindre le port le plus rapproché de leur pays ou un port neutre plus proche encore.

GREAT BRITAIN.

(17) Une puissance neutre ne devra pas permettre sciemment à un navire de guerre d'un belligérant se trouvant dans sa juridiction de prendre à bord des munitions, vivres ou combustibles si ce n'est dans le cas où les munitions, vivres ou combustibles déjà à bord du navire ne lui suffiraient pas pour gagner le port le plus proche de son propre pays; la quantité de munitions,

vivres ou combustibles chargées à bord du navire dans la juridiction neutre ne devra en aucun cas dépasser le complément nécéssaire por lui permettre de gagner le port le plus proche de son propre pays.

JAPAN.

(4) Les navires belligérants ne pourront dans les ports ou les eaux neutres, ni augmenter leurs forces de guerre, ni faire de réparations sauf celles qui seront indispensables à la sécurité de leur navigation, ni charger aucun approvisionnement excepté du charbon et des provisions suffisant, avec ce qui reste encore à bord, pour les mettre à même d'atteindre à une vitesse économique le port le plus rapproché de leur pays ou une destination neutre plus proche encore.

RUSSIA.

(7) Il est interdit aux bâtiments de guerre des Etats belligérants, pendant leur séjour dans les ports et les eaux territoriales neutres, d'augmenter à l'aide de ressources puisées à terre, leur matériel de guerre ou de renforcer leur équipage.

Toutefois les bâtiments susmentionnés pourront se pourvoir de vivres, denrées, approvisionnements, charbon et moyens de réparation nécessaires à la subsistance de leur équipage ou à la continuation de leur navigation. (Deuxiéme Conférence de la Paix, Tome III, p. 710.)

Discussion at The Hague, 1907.—The plenipotentiary from the Netherlands said of the replies to question III, relating to the use of neutral ports and waters:

Comme j'avais l'honneur de faire ressortir dans la séance précédente de cette Sous-Commission les règles conventionelles à édicter par rapport au régime des navires de guerre belligérants dans les ports neutres doivent en premier lieu être bien précises afin qu'elles ne donnent pas lieu à des malentendus fâcheux.

C'est dans cet ordre d'idées que je me permets d'appeler votre attention sur l'article 1 de la proposition espagnole et sur l'article 1 de la proposition japonaise où il est parlé de "base d'opérations de guerre quelle que soit la nature de ces opérations" et de "lieu d'observations ou de rendez-vous soit comme bases d'opérations de guerre ou de buts militaires de toute nature." Je crois que chaque navire de guerre belligérant sans exception tombe sous l'application de ces articles car je ne peux pas me figurer en tel navire qui ne se livre pas à des opérations de guerre dans le sens large que l'article espagnol attribue à cette expression et que les articles correspondants des propositions russes et brittanniques ne semblent pas exclure. Aussi ai-je peine à me figurer un navire de

guerre belligérant qui naviguera sans but militaire. (Article 1 japonais.)

En effet même si le navire ne fait que surveiller le commerce neutre il poursuit sans doute un but militaire. Cependant ces propositions admettent la possibilité pour les navires belligérants de s'approvisionner de vivres et de charbon (article 5 proposition espagnole et article 4 proposition japonaise), mais l'article 5 de la proposition japonaise contient encore une restriction qui pourrait être considérée comme une défense absolue, car elle comprend non seulement les navires belligérants se rendant sur le théâtre de la guerre ou se dirigeant vers cette même direction ou vers la zone des hostilités existantes, mais aussi ceux dont la destination est douteuse ou inconnue. Cette dernière catégorie semble comprendre tous les navires belligérants, les commandants de ces navires auront tous des ordres qu'il ne leur sera pas permis de communiquer aux autorités dans les ports neutres. On pourra donc les considérer comme ayant presque toujours une destination douteuse ou inconnue.

Il y a ici une ambiguité sinon une contradiction due au sens vague des expressions "opérations de guerre" etc., etc., et je me permets d'appeler de nouveau l'attention de cette Sous-Commission sur l'intérêt qu'il y aurait à mieux préciser ces expressions, si elles sont indispensables.

Avant tout, je le répète, la convention sur laquelle la Conférence tombera d'accord, devra être précise afin de ne pouvoir donner lieu à des malentendus.

Si l'incertitude qui règne maintenant à défaut de règles conventionelles, subsiste après que ces règles auront été établies parce qu'elles ne sont pas précises, les neutres resteront aux prises avec des difficultés qui pourront provoquer des conflits graves. La Délégation britannique, dans l'article 10*a* et *b*, a formulé quelques règles positives qui définissent l'expression *base d'opérations*. C'est un système que j'approuve, mais je crois qu'il faudrait encore ajouter quelques règles négatives; qu'il faudrait formuler quelques cas qui ne doivent pas être considérés comme faisant servir les eaux neutres comme base d'opération, par example:

I. Les ports et les eaux territoriales neutres ne peuvent pas être considérés comme servant de bases d'opérations de guerre, si les navires de guerre des Etats belligérants y prennent à bord des combustibles nécessaires pour atteindre le port étranger non ennemi qui est le plus proche.

II. De même les navires de guerre d'un État belligérant qui se trouvaient à l'étranger lors du commencement de la guerre, peuvent toujours se pourvoir dans un port ou les eaux territoriales neutres des combustibles nécessaires pour atteindre un port de leur pays sans que par ce fait le port neutre puisse être considéré de servir comme base d'opérations de guerre. (Ibid., p. 592.)

Sir Ernest Satow, representing Great Britain, pointed out that it appeared necessary to make a distinction—

entre les approvisionnements qu' on peut effectuer dans un port neutre: il est permis d'acheter des vivres pour nourrir momentanément les équipages, tandis que les ravitaillements par les navires auxiliaires constitue une véritable opération de guerre. (Ibid., p. 594.)

M. Tcharykow, of Russia, said in speaking of question XII, in regard to taking provisions and coal in a neutral port:

Tout le monde, Messieurs, est d'accord pour reconnaître qu'un Etat neutre n'a pas le droit d'augmenter dans ses ports la force de combat des navires des belligérants. Car s'il le faisait il favoriserait un belligérant au détriment de l'autre. Mais, pour cette même raison, un Etat neutre n'a pas non plus le droit de diminuer dans ses ports la force de combat des navires des belligérants: en faisant cela il favoriserait l'autre belligérant au dépens de celui ci. Ces deux procédés seraient également contraires au droit des gens et constitueraient une infraction à la neutralité de l'Etat en question.

Si l'Etat neutre veut éviter les reproches des belligérants, il doit s'abstenir de toute ingérence dans la vie intérieure du navire étranger, il ne doit pas s'ériger à son égard, en juge, expert ou inquisiteur—un rôle qui serait fatal pour sa neutralité. S'il veut rester vraiment neutre, il doit se borner à *le laisser vivre.*

Or, Messieurs, la vie d'un navire embrasse deux éléments qui sont indissolublement connexes: les vivres pour son équipage et les moyens de locomotion pour lui-meme. Si l'équipage était privé de vivres, les hommes deviendraient des cadavres; privé des moyens de naviguer, un bâtiment devient une épave. Dans les deux cas le navire meurt. Mais le tuer est le droit de belligérant ennemi, s'il peut y parvenir, ce n'est ni le droit, ni le devoir du neutre.

Ces considérations nous amènent à la conclusion que les restrictions qu'un Etat neutre pourrait, en bon droit, imposer dans ses ports à l'approvisionnement des navires des belligérants, tant en vivres qu'en moyens de locomotion, ne sauraient, en aucun cas, prendre les proportions d'une atteinte aux intérets vitaux de ces navires. L'Etat neutre qui dépasserait cette limite dans l'exercise de ses droits souverains se rendrait coupable d'un acte peu amical a l'égard de l'un des belligérants, il favoriserait illégalement l'autre et il s'exposerait de la part de tous au soupçon d'avoir violé sa neutralité.

Par conséquent, Messieurs, la "thèse nouvelle" comme l'a si justement appelée la Délégation brésilienne dans son remarquable

exposé du 27 juillet, cette thèse qui consiste à vouloir refuser aux belligérants de s'approvisionner de charbon dans les ports neutres— demande à être soumise à un examen très attentif afin d'établir jusqu'à quel point elle est conforme aux principes reconnus jusqu'à présent du droit des gens.

Cette thèse est née non pas de considérations juridiques nouvelles, mais exclusivement de nouveaux perfectionnements techniques. (Ibid, p. 607.)

The Japanese plenipotentiary, M. Tzudzuki, speaking on this matter, said:

En outre de ce principe non moins universellement reconnu que les belligérants doivent s'abstenir de l'usage des ports neutres comme bases de leurs opérations belliqueuses, il s'ensuit tout naturellement que les neutres ont le devoir de ne pas permettre aux belligérants de faire usage de leurs ports dans le sens indiqué.

Il me semble qu'il découle de là, avec une nécessité logique et absolue, cette conséquence que les ports neutres ne doivent pas être employés dans le but de conserver aux navires belligérants leur force de combat, sans parler de l'augmentation de cette force. Il me paraît également clair que le charbon, étant tout a fait indispensable à ces navires pour agir comme des unités de combat, a une valeur stratégique dans la guerre moderne, que l'approvisionnement en charbon est un acte qui appartient à la récupération des forces perdues, qu'en conséquence le fait de se servir de ces ports comme de bases de charbon n'est qu'une de modalités de s'en servir comme de bases stratégiques, ainsi que l'a remarqué fort bien l'un des auteurs déjà cités.

Nous regrettons vivement de ne pouvoir nous rallier à l'opinion que les neutres n'ayant pas le droit de diminuer la force de combat des navires belligérants doivent en conséquence permettre à ceux-ci de s'approvisionner dans leurs ports. En effet l'approvisionnement en charbon étant un acte indispensable aux belligérants pour conserver à leurs navires leur puissance de combat, ils n'ont qu'à faire accompagner ces navires par des bateaux charbonniers et à s'approvisionner en pleine mer. C'est là un acte de préparation et de prévoyance nécessaire et suffisant pour une expédition lointaine. Tout ce que nous voulons soutenir, c'est qu'il ne doit pas être abusé des ports neutres ni pour remplacer ces bateaux charbonniers ni pour leur permettre d'executer leur service auxiliaire.

Il faut de plus ne pas perdre de vue que ces actes d'approvisionnement se font sous l'abri que la neutralité offre à ces navires en leur permettant de rester dans ses ports sans craindre d'y être molestés par leur adversaire, ce qui équivaudrait à dire que c'est le concours que donne la neutralité que permet aux belligérants de faire en sécurité des préparatifs stratégiques.

Il y a là une raison de plus pour que ces navires s'abstiennent d'opérations qui visent à la récupération périodique de leur force matérielle de combat. La même remarque s'appliquerait, peut-être avec plus de force encore, à l'usage de ces ports pour la réparation des avaries, et pour le rétablissement des forces de l'équipage fatigué de ces navires.

Les seules exceptions que l'on devrait faire aux principes rapportés ci-dessus, ce sont les cas où des considérations humanitaires prennent le dessus, les cas du mauvais état de la mer, des avaries causées par les dangers de la mer etc. Le fait que la quantité de charbon à fournir à ces navires est limitée par les législations de plusieurs pays dans la mesure nécessaire pour atteindre leur propre port national, ne fait qu'accentuer l'idée d'asile humanitaire qui justifie ces exceptions. De même la limitation des réparations des avaries dans la measure de ce qui est absolument nécessaire pour la navigabilité, etc., etc.

La question de fait où finit l'asile humanitaire et où commence l'abus de cette hospitalité en vue de dissimuler des opération ou des préparations stratégiques est souvent très délicate et la réponse est très difficile. (Ibid., 461.)

Base.—The word "base" has been used in many senses. It is often coupled with some other word which modifies its meaning. The most common expression is "base of operations," though "base of supplies," "base of communications" and other expressions are used. The modifying words are differently interpreted.

The use of neutral territory by a belligerent as a base in the sense of a place in which a belligerent may habitually prepare to wage war more effectively against his enemy, fit out expeditions, take refuge, or establish a rendezvous is usually regarded as contrary to, or a violation of neutrality. The Hague Convention relative to the Rights and Duties of Neutral Powers in Maritime War provides at the outset that the belligerent shall not throw all obligation upon the neutral, saying:

Article I. Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality.

Review of Situation V (2).—It might happen that a naval collier would be engaged in the transportation of a certain grade of fuel which would not be adapted for

its own engines, in such case the collier might obtain coal in a neutral port under the restrictions applicable to ships of war.

It is well established that the bona fide merchant vessels of a belligerent may carry on trade with a neutral without involving the neutral State in obligation. The merchant vessel of the belligerent State would be liable to capture, but this would not be a responsibility with which the neutral State would be concerned.

The supplying of Government or other colliers known to be in the service of a belligerent State with coal except for their own steaming purposes would be analogous to the supply of war material to a belligerent vessel which is prohibited. The furnishing of coal in a neutral port to a belligerent collier except to enable the collier to keep the sea and under the restrictions prescribed for ships of war would be in the nature of the use of the port as a base. The neutral should prohibit such use. Referring to the British proclamation of 1904 allowing to the belligerent ships in British ports only—

> so much coal as may be sufficient to carry [her] to the nearest port of her own country or to some nearer named neutral destination; and no coal shall again be supplied to [her] in the same or any other port, roadstead or waters subject to the territorial jurisdiction of H. M., without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters.

Prof. Westlake says:

> It is understood that the coal supplied under such a rule shall be used in proceeding to the destination which the commander of the ship named as being that of which the distance authorized the supply, and it may fairly be argued that in proceeding to that destination she shall make no captures, since her making any during a voyage which she had been expressly coaled for would constitute the neutral port her base of operations for the specific operation of war constituted by them; only if she is attacked during that voyage she may of course defend herself. But the legitimation by international practice, however faulty in principle, of the mere receipt of supplies without a specification of the use to which they are to be put, must imply the legitimation of any use to which they may be put. (Westlake, International Law, part 2, p. 211.)

The Government of belligerent State X requests the neutral State Z to forbid naval and merchant colliers of belligerent State Y to load coal in B, a port of neutral State Z, on the ground that this makes B a base for Y. The request relates to vessels of two classes, viz, naval and merchant colliers. Naval colliers, if belonging to or in the service of State Y, would be under the same rules as regards coaling as would apply to any ships of war of State Y. Merchant colliers not in the service of either belligerent would be free to engage in trade in coal subject to the usual risks of war.

Solution V (2).—The Government of neutral State Z should heed the request of belligerent State X as regards the naval colliers and other colliers belonging to or in the service of State Y, though there might be circumstances when it would be justifiable to allow a collier to take coal necessary for its own use, but merchant colliers may be allowed to take coal.

Status of colliers.—The status of auxiliary colliers was considered at the Naval War College in 1907 in Situation II, and it was the conclusion that the regular auxiliary colliers were to be treated as public vessels. A naval collier would therefore be treated as a vessel of the Navy.

Colliers belonging to the merchant marine and flying the merchant flag of a belligerent State are liable to capture by the opposing belligerent, but the neutral State is under no obligation to restrict the amount of coal which they may take on board.

Similarly colliers belonging to the merchant marine of a neutral State may take coal freely as far as neutral regulations are concerned. Such vessels will, of course. be liable to penalty if engaged in the carriage of contraband or in unneutral service. These penalties do not place the neutral State under obligation.

Penalty for unneutral service.—The penalty for unneutral service, like the penalty for the carriage of contraband, is one which a belligerent may inflict, and unneutral service is not an act which the neutral State is

bound to prevent. Article 7 of The Hague Convention Relative to the Rights and Duties of Neutral Powers in Maritime War provides that—

> A neutral power is not bound to prevent the export or transit on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.

Of unneutral service the general report of the International Naval Conference upon the Declaration of London says:

> CHAPTER III.—*Unneutral service.*
>
> In a general way it may be said that the merchant vessel which violates neutrality, whether by carrying contraband of war or by violating a blockade, affords aid to the enemy, and it is on this ground that the belligerent to whose injury she acts may make her submit to certain penalties. But there are cases where such unneutral service is particularly distinctive. and for which it has been thought necessary to make special provision. These have been divided into two classes, according to the gravity of the act charged against the neutral vessel.
>
> In the cases included in the first class (art. 45) the vessel is condemned and receives the treatment of a vessel subject to condemnation for carrying contraband. This means that the vessel does not lose her neutral character and is entitled to the rights conceded to neutral vessels; for instance, she may not be destroyed by the captor except under the conditions laid down for neutral vessels (arts. 48 et seq.) ; the rule that *the flag covers the goods* applies to the goods which are on board.
>
> In the more serious cases, which belong to the second class (art. 46), the vessel is likewise condemned; further, she is treated not only as a vessel liable to condemnation for carrying contraband, but as an enemy merchant vessel, which entails settled consequences. The rule regarding the destruction of neutral prizes does not apply to the vessel, and, as she has become an enemy vessel, it is no longer the second, but the third, rule of the declaration of Paris which is applicable. The goods which are on board will be presumed to be enemy goods; neutrals will have the right to reclaim their property on establishing their neutrality (art. 59). It would not, however, be necessary to go so far as to consider that the original neutral character of the vessel is completely lost, so that she should be treated as though she had always been an enemy vessel. The vessel may plead that the allegation made against her is not just; that the act with which she is charged has not the character of unneutral service. She

has, therefore, the right of appeal to the international court in virtue of the provisions which protect neutral property. (International Law Topics, Naval War College, 1909, p. 99.)

According to the provisions of article 46 of the Declaration of London—

> A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which she would undergo if she were a merchant vessel of the enemy:
>
> (1) If she takes part in the hostilities.
>
> (2) If she is under the orders or under the control of an agent placed on board by the enemy government.
>
> (3) If she is chartered entire by the enemy government.

It is here prescribed that the belligerent may treat the vessel engaged in unneutral service as he would treat an enemy merchant vessel. An enemy merchant vessel would be permitted to take on such articles in a neutral port under present laws as the master of the vessel might determine. The transaction is regarded as a business transaction and therefore is permitted, though it is understood that the neutral will give no protection to the parties engaging in the transaction and that the belligerent may inflict penalty if the property falls into his hands.

The principles set forth in the preceding discussions apply to Situation V (3), (4), (5).

Solution V (3).—The Government of neutral State Z is under no obligation to forbid the supply of cargo coal to neutral vessels.

Solution V (4).—If the collier of belligerent State Y has entered or is sojourning in the port of neutral State Z in contravention of the regulations of State Z, the collier may be interned.

The colliers flying the merchant flag of neutral State Z or neutral State M may be guilty of unneutral service, but this does not involve State Z in any obligation to intern the colliers.

Solution V (5).—The colliers should be released if their relations to the belligerent have been simply those of neutral merchant colliers. Their liability for carriage would be deposited with the cargo.

If the colliers were chartered entire by or under the orders or control of the enemy government or otherwise engaged in unneutral service they would be liable to detention.

SOLUTION.

(1) As the apparent destination of the cargo is a neutral port of Z, the commander of the cruiser of Z should not withdraw his protection unless he is reasonably certain that his confidence has been betrayed.

(2) The Government of neutral State Z should heed the request of belligerent State X as regards the naval colliers and other colliers belonging to or in the service of State Y, though there might be circumstances when it would be justifiable to allow a collier to take coal necessary for its own use, but merchant colliers may be allowed to take coal.

(3) The Government of neutral State Z is under no obligation to forbid the supply of cargo coal to neutral vessels.

(4) If the collier of belligerent State Y has entered or is sojourning in the port of neutral State Z in contravention of the regulations of State Z, the collier may be interned.

The colliers flying the merchant flag of neutral State Z or neutral State M may be guilty of unneutral service, but this does not involve State Z in any obligation to intern the colliers.

(5) The colliers should be released if their relations to the belligerent have been simply those of neutral merchant colliers. Their liability for carriage would be deposited with the cargo.

If the colliers were chartered entire by or under the orders or control of the enemy Government or otherwise engaged in unneutral service they would be liable to detention.

Situation VI.

Conversion of merchant ships into ships of war.

There is war between the United States and State D. Other States are neutral. A cruiser of the United States enters port N of State F and finds the *Robin*, a vessel registered as belonging to a private citizen of State D. The *Robin* is well adapted for transformation into a vessel of war and is taking on supplies of the nature of contraband. The commander of the cruiser has reason to believe that as soon as the *Robin* reaches the high seas she will be transformed into a war vessel, and informs the neutral authorities, requesting that the *Robin* be interned or otherwise restrained.

Is the action of the commander warranted?

What should the neutral State do?

What regulations should be made in regard to the transformation of private vessels into war vessels?

Solution.

The action of the commander of the cruiser of the United States is warranted.

Neutral State F should take such action as would maintain its neutrality by obliging the *Robin* to give a guaranty that it would not change its private character till it reached a port under the jurisdiction of its own flag or a port under jurisdiction of an ally: or neutral State F may maintain its neutrality by other means of restraint, even by internment if necessary.

Notes.

General.—The subject of conversion of merchant vessels into war vessels has naturally received much attention since the abolition of privateering. While certain States did not accede to the declaration of Paris of 1856 by which "Privateering is and remains abolished," it may be said that the principle of abolition of privateer-

ing is generally adopted. The conversion of merchant vessels into war vessels in time of war is, however, approved, but the essential difference is in the fact that the converted vessel, unlike the privateer, is placed under a duly commissioned officer of the State which accepts the service, and the State thereby becomes responsible for the acts of the converted vessel. The vessel may have belonged to the class of volunteer, auxiliary, or subsidized vessels with a quasi-public character, or may have been a private vessel in the strict sense. To whatever class a vessel belongs, it may be expected that a State will in time of war on the sea, as well as in time of war on land, use so far as possible the resources at its disposal. It may be further said that such a course is in every way justifiable. If the State can call upon its citizens to give up their lives in its defense, there is no reason why it should not require their property whether on land or sea.

The opposing belligerent is entitled to know, however, whether a ship which he may meet is a public or a private ship of the enemy, as his conduct must be governed by that knowledge. The neutral State is similarly bound to distinguish public and private vessels. The neutral State may allow a private vessel to remain in its ports for an indefinite period. The usual limit of sojourn for a public ship of war in time of war is 24 hours. Other obligations for the treatment of a belligerent ship of war also rest upon the neutral. It is, therefore, very important that means should be devised for determining the character of vessels flying a belligerent flag in time of war.

Discussion in 1906.—This War College considered in 1906 the question, "What regulations should be made in regard to subsidized, auxiliary, or volunteer vessels in time of war?"

This discussion was prior to the Second Hague Peace Conference of 1907, at which the question of transformation of merchant vessels into ships of war was considered, but subsequent to the Russo-Japanese War of 1904–5,

during which the question had become one of vital importance and one which gave rise to considerable international friction.

The result of the discussion in 1906, which was as full as the limited time of the conference permitted, is shown in the following:

Need of established character.—It is necessary that there should be some mark by which the character of a vessel may be established so far as a neutral may be concerned. It is not in any way reasonable to expect that a vessel may one day fly a merchant flag and the next day that of a ship of war and the following day that of a merchant vessel again. If it is proper for a vessel to sail from a port as a merchant vessel and on the high sea to assume the character of a war vessel, would it not be possible to reverse the process and make such changes as frequently as might serve a belligerent's purpose.

It is certain that acts of war on the sea should be confined to war vessels and that merchant vessels should not visit, search, or capture merchant vessels of an enemy or of a neutral. Under certain conditions a war vessel may, however, do these things. A merchant vessel is subject to the jurisdiction of the port in which it may be, so far as the local regulations require. A vessel of war is to a large extent exempt from local jurisdiction. There is little restriction upon the nature of articles which a merchant vessel may take on board. A war vessel of a belligerent in time of hostilities may not in a neutral port do certain acts or take certain articles on board which would be allowed in time of peace or to a merchant vessel in time of war.

If no restrictions are made, the neutrals may through ignorance of the character of a vessel furnish it with supplies of a forbidden amount or character. A vessel which could change its character at will might enter a neutral port repeatedly as a merchant vessel and after each departure again assume a warlike character, thus making of a neutral port a base. Of course, it is not reasonable to expect that such acts would be tolerated.

Summary: There seem to be certain general considerations which should guide in the regulation of the use of subsidized, auxiliary, or volunteer vessels:

1. Such vessels should be during the war public vessels under regularly commissioned officers in order that the principle of Article I of the declaration of Paris, 1856, may be regarded. They should be incorporated in the navy.

2. The neutral in whose port such vessel may be or within whose port such vessel may come is entitled to know the character of the vessel in order that the laws of neutrality in furnishing supplies, etc., may be observed.

3. The character once assumed should not be changed except under adequate restrictions in order that reasonable security may be given to the neutral in his relation to the vessel.

Conclusions: From the foregoing it is evident that the use, for all purposes of naval warfare of auxiliary, subsidized, or volunteer vessels, regularly incorporated in the naval forces of a country, is in accord with general opinion and practice, and that this addition to their regular naval forces in time of war is contemplated by nearly all if not all the principal maritime nations. In fact auxiliaries have been so used in all recent naval wars. To secure for subsidized, auxiliary, and volunteer vessels the proper status in time of war, the following regulations are proposed:

1. When a subsidized, auxiliary, or volunteer vessel is used for military purposes it must be in command of a duly commissioned officer in the military service of the Government.

2. When subsidized, auxiliary, or volunteer vessels, or vessels adapted for or liable to be incorporated into the military service of a belligerent, are in a neutral port in the character of commercial vessels at the outbreak of hostilities, the neutral may require that they immediately furnish satisfactory evidence whether they will assume a military or retain a commercial character.

3. Subsidized, auxiliary, or volunteer vessels, or vessels adapted for or liable to be incorporated into the military service of a belligerent, on entering a neutral port after the outbreak of hostilities, may be required by the neutral immediately to make known whether their character is military or commercial.

4. Until publicly changed in a home port, such vessels as have made known their character must retain as regards neutrals the character assumed in the neutral port.

5. The exercise of belligerent authority toward a neutral by subsidized, auxiliary, or volunteer vessels is sufficient to establish their military character. (International Law Topics and Discussions, Naval War College, 1906, p. 122.)

Propositions at the Second Hague Conference, 1907.— Several States made propositions for the regulation of the conversion of merchant vessels into vessels of war at The Hague conference in 1907. As there was a considerable divergence in the point of view of some of these States, these propositions are given in full. Great Britain proposed to classify and define vessels of war as follows:

Il y a deux catégories de vaisseaux de guerre:

A. Vaisseaux de combat.

B. Vaisseaux auxiliaires.

A. Sera compris dans le terme "*vaisseau de combat*": Tout navire battant un pavillon reconnu, armé aux frais de l'État pour attaquer l'ennemi et dont les officiers et l'équipage sont dûment autorises à cet effet par le Gouvernement dont ils dépendent. Il ne sera pas licite au navire de revêtir ce caractère sauf avant son départ d'un port national ni de s'en devêtir sauf après être rentré dans un port national.

B. Sera compris dans le terme "*vaisseau auxiliaire*": Tout navire marchand, soit belligérant soit neutre, qui sera employé au transport de marins, de munitions de guerre, combustibles, vivres, eau ou toute autre espèce de munitions navales, ou qui sera destiné à l'exécution de réparations ou chargé du port de dépêches ou de la transmission d'information si le dit navire est obligé de se conformer aux ordres de marche à lui communiqué soit directement soit indirectement, par la flotte belligérante. Sera de même compris dans la définition tout navire employé au transport de troupes militaires. (Deuxième Conférence Internationale de la Paix, Tome III, p. 1135.)

Russia:

Est considéré comme bâtiment de guerre tout navire commandé par un officier de marine en activité de service et pourvu d'un équipage soumis au code militaire. Le batiment doit porter, par ordre de son Gouvernement, le Pavillon de guerre, ce qui implique, dès le moment, où cet ordre est donné, l'inscription du bâtiment dans la liste des navires de guerre de son pays. (Ibid., p. 1135.)

Italy proposed definite limitations on transformation:

Un navire de commerce ne pourra être transformé en navire de guerre qu'à condition d'être placé sous les ordres d'un officier de la marine militaire de son État et d'être pourvu d'un équipage soumis à toutes, les règles de la discipline militaire.

Les navires qui quittent les eaux territoriales de leur pays après l'ouverture des hostilités, ne peuvent changer leur qualité ni dans la mer libre ni dans les eaux territoriales d'un autre État. (Ibid., p. 1136.)

With this proposition Mexico agreed. (Ibid., p. 814.)

Netherlands would also impose a penalty as well as provide regulations:

1°. Il est permis de transformer un navire de commerce au service de l'État en navire de guerre.

2°. Les navires transformés doivent être commandés par un Chef militaire et composés en tout ou en partie d'un équipage militaire.

3°. Le navire transformé doit battre à sa corne et au haut de son mât le pavillon de guerre et la flamme ou le pavillon de commandement.

4°. La transformation ne peut être effectuée en temps de guerre que dans un port national; le navire transformé doit y être pourvu d'une commission, fournie par l'autorité compétente du Gouvernement dont il porte le pavilion.

5°. Le commandant du navire transformé doit respecter les coutumes et les lois de la guerre sur mer.

6°. Tout navire qui prétend être navire de guerre sans répondre aux conditions ci-dessus formulées, sera traité en vaisseau-pirate. (Ibid., p. 1136.)

Dr. Lammasch proposed in behalf of Austria to add to the Netherlands proposition:

La transformation sera permanente pendant toute la durée des hostilités et la re-transformation sera interdite. (Ibid, p. 1138.)

With this proposition Germany agreed. (Ibid, p. 814.)

Japan:

Le navire de commerce ne peut être transformé en navire de guerre que dans les ports nationaux ou les eaux territoriales de l'État auquel appartient le navire de commerce en question, ou dans les ports ou les eaux territoriales occupés par ses forces navales ou militaires. (Ibid, p. 1136.)

United States:

Un navire de guerre doit être commandé par un officier régulièrement commissioné et avec un équipage soumis à la loi et à la discipline militaires.

En temps de guerre, aucun navire de commerce ne sera transformé en navire de guerre, à moins d'être commandé par un officier régulièrement commissionné et avec un équipage soumis à la loi et à la discipline militaires, et aucune transformation de ce genre ne pourra avoir lieu sauf dans les eaux territoriales de l'État possédant le navire, ou dans les eaux territoriales sur lesquelles il exerce par ses forces militaires, un contrôle effectif. (Ibid, p. 1137.)

Questionnaire at Second Hague Conference, 1907.—A questionnaire prepared by M. de Martens and submitted to the fourth commission at The Hague in 1907, contained the following questions:

I. Est-il admis, par la pratique et les législations, que les États belligérants puissent transformer des navires de commerce en navires de guerre?

II. Dans les cas de transformation des navires de commerce en navires de guerre, quelles sont les conditions légales que les États belligérants devraient observer? (Deuxième Conférence Internationale de la Paix, Tome III, p. 1133.)

Discussion at Second Hague Conference, 1907.—There was a general agreement among the delegates to the Second Hague Conference that the transformation of merchant vessels into war vessels should be allowed. (Deuxième Conférence Internationale de la Paix, Tome III, p. 745.)

The question as to where transformation might take place called forth difference of opinion. Vice Admiral Siegel presented the views of the German delegation. He compared the volunteer Navy to the militia or volunteer troops on land which the State might call into service in such manner as it saw fit without consideration of other States except to the extent that such troops must be under a responsible officer and form a part of the public forces. He said:

Or, quelques Délégations proposent que la transformation ne puisse être effectuée que dans les eaux territoriales du pays. Je ne crois pas que cette restriction soit juridiquement justifiée ou militairement admissible.

Quoique en général les navires soient mis en service militaire, c'est-à-dire soient transformés en navires de guerre, au commencement de la campagne, et lorsqu'ils seront dans un port national, il est nullement défendu de les mobiliser à un autre temps convenable, et aucune loi, aucune règle internationale n'interdit la transformation en dehors des eaux territoriales en mer libre.

Personne ne peut contester qu'un État garde et conserve la juridiction des navires de son pavillon qui se trouvent en mer libre.

Si des lois spéciales d'un État permettent que les biens de sès sujets peuvent être employés pour les opérations de guerre, l'État peut faire usage de ce droit non seulement en dedans de la sphère de sa juridiction territoriale, mais aussi en mer libre, qui n'est sujette à aucune juridiction particulière.

Un navire de commerce, transformé en navire de guerre en mer libre, devient juridiquement un navire de guerre, pourvu que les conditions légales exigées pour cette transformation soient observées.

L'idée de la proposition de la Délégation italienne (Annexe 4) répond à notre manière de voir. Elle dit en effet que la trans-

formation doit être permise et dans la mer libre et dans les eaux territoriales d'un autre État, à l'exception des navires qui quittent les eaux territoriales de leur pays après l'ouverture des hostilités.

Il me semble que cette dernière condition est trop sévère et qu'elle peut être abandonnée. (Deuxième Conférence Internationale de la Paix, Tome III, p. 821.)

Col. Ovtchinnikow, of the Russian Admiralty, said:

La proposition russe vise les cas où cette transformation peut être accomplie même dans la mer libre.

Au point de vue pratique, c'est une hypothèse qui peut survenir presque chaque jour pendant les hostilités. Par exemple:

Un bâtiment de guerre recontre un navire de commerce de son adversaire. Selon les coutumes existantes il fait la capture, embarque sur ce navire ses marins, place la prise sous le commandement d'un officier et arbore le pavillon de guerre.

Je crois que la transformation qui était faite dans ces conditions doit être traitée comme tout à fait légale. Les prises, à partir du moment de la capture, sont des navires de guerre. Elles ne peuvent être traitées comme les pirates et ont le droit de se défendre et de se battre contre l'ennemi. Mais je dois indiquer que dans ce cas la transformation des navires de commerce, en qualité de prises, en navire de guerre, était effectuée en pleine mer.

D'autre part, j'envisage une autre hypothèse. Une flotte ou un navire de guerre d'un des belligérants recontre en pleine mer un navire de commerce de son propre pays. Pourqui cette flotte ou ce navire de guerre, ayant le droit de traiter les prises comme les navires de guerre, n'aurait-il pas le droit de transformer en navire de guerre le navire de son propre pays? Je crois qu'ordinairement les transformations seront faites dans les eaux territoriales à raison de ce que telle transformation sera toujours beaucoup plus solide.

Mais il arrive des cas, où il serait impossible de nier le droit du belligérant de transformer des navires de commerce en navires de guerre même au dehors des eaux territoriales. (Ibid., p. 822.)

The British position was stated at length by Lord Reay:

Pour qu'un navire de guerre devienne un navire au service de l'État, il faut qu'il soit pouryu d'une commission et beaucoup d'opérations de guerre navales ne peuvent légalement être entreprises que par un navire appartenant au Gouvernement d'une Puissance reconnue et possédant la commission voulue. Un navire qui entrerait dans un port neutre comme simple navire de la marine marchande et qui quitterait ce port comme navire de guerre avec la commission nécessaire aurait subi dans les eaux neutres une transformation complète et aurait augmenté sa valeur

comme unité de combat. Or un neutre ne peut, sans violer les principes de la neutralité, permettre à un navire belligérant d'augmenter sa valeur comme combattant dans les eaux territoriales neutres: il s'ensuit qu'un État neutre ne peut permettre, sous peine d'encourir le même reproche, à un navire qui entrerait dans ses eaux territoriales comme non-combattant, de quitter ces eaux comme navire de guerre dûment autorisé par un État belligérant et aménagé en vue de prendre part aux hostilités.

Mais si le neutre est tenu de faire ainsi respecter la neutralité de ses eaux territoriales, le belligérant est également tenu de s'abstenir de la violer. Il est donc clair que, si le fait pour un État neutre de permettre à un navire belligérant de se transformer en navire de guerre dans ses eaux territoriales constitue une infraction à la neutralité, il est également du devoir du belligérant de ne pas commettre un acte de ce genre dans les eaux territoriales neutres, et que tout navire qui a été ainsi transformé, au mépris de la neutralité du neutre et des devoirs du belligérant, n'a pas acquis régulièrement le caractère d'un navire de guerre, et que sa qualité comme tel ne doit pas être reconnue.

L'objection que nous pouvons élever à l'égard de la transformation en pleine mer est tout autre. Le droit international, tel qu'on le comprend à cette heure, permet à un navire belligérant régulièrement constitué navire de guerre, d'exercer les droits d'un belligérant non seulement contre l'ennemi mais aussi à l'égard des neutres. Or un neutre a le droit de savoir jusqu'à un certain point quels sont les navires qui pourront exercer ces droits. S'il était loisible à des navires ayant quitté des ports nationaux en qualité de navires de la marine merchande de se transformer en pleine mer et d'apparaître tout d'un coup comme navires de guerre, sans que les neutres aient pu prendre connaissance des changements, il est certain qu'un tel état des choses occasionnerait des incidents regrettables. Toutes les fois donc qu'un navire aurait été transformé en navire de guerre en pleine mer ou dans des eaux territoriales neutres, il pourrait s'en suivre des complications qui mèneraient à leur tour à des situations intolérables. Il n'est possible de parer aux éventualités que je viens de signaler qu'en reconnaissant franchement que le fait de transformer un navire en navire de guerre est un "acte de souveraineté" dans toute l'acceptation du terme, que cette transformation ne peut par conséquent avoir lieu que dans la juridiction nationale et qu'un navire de guerre ne sera reconnu comme tel que si cette condition a été observée. (Ibid., p. 822.)

M. Renault, a French delegate, shared Lord Reay's opinion that transformation in a neutral port would be contrary to neutrality, but did not regard the argument against transformation on the high sea as valid because

there the State was sovereign over the vessels flying its flag. (Ibid., p. 824.)

The Netherlands delegate supported the British position.

Count Tornielli explained the Italian proposition as follows:

> Les navires de commerce qui ont quitté les eaux territoriales avant l'ouverture des hostilités doivent pouvoir opérer en la mer libre ou ailleurs la transformation qui pourra leur permettre de résister à une capture possible. Ces motifs ne sauraient militer en faveur des navires qui n'ont quitté les eaux territoriales qu'après les hostilités et par conséquent ont pu prendre d'avance les dispqsitions nécessaires. (Ibid., p. 824.)

M. Fusinato said, in support of the Italian proposition—

> il y a un motif dont on n'a pas parlé; il serait fâcheux qu'un navire marchand qui sort d'un port neutre où il a joui des privilèges de navire de commerce puisse mettre ce privilège à profit pour se transformer en navire de guerre. Il semble qu'il y aurait la un abus de son privilège, et que par suite il lui soit difficile de changer sa qualité même en mer libre. (Ibid., p. 824.)

In the *comité d'examen*, whose duty it was to consider the question of transformation, the German delegate supported the position of Russia favoring transformation on the high sea.

The Japanese delegate, on the other hand, would not only favor the prohibition of transformation on the high sea, but would prohibit transformation in ports of allies because such ports were not within the sovereignty of the belligerent.

The question of transformation on the high seas finally came before the *comité d'examen* in the following form:

> Y a-t-il lieu de poser des règles d'après lesquelles le belligérant pourra faire en haute mer la transformation de navires de commerce en navires de guerre. (Deuxième Conférence de la Paix, Tome III, p. 933.

In the affirmative were the votes of Germany, Austria-Hungary, Argentina, Chile, France, Russia, Servia, and in the negative, United States, Belgium. Brazil, Great Britain, Italy, Japan, Norway, Netherlands, Sweden. The prohibition of transformation on the high seas was

not determined upon, and in this respect there was no international agreement reached, and the preamble of the convention upon the subject of transformation distinctly states that the place of conversion "remains outside the scope of this agreement."

Hague convention relative to the conversion of merchant ships into war ships.—The convention finally agreed upon really relates to vessels which *have already been converted* into war vessels rather than to their conversion. The articles bearing on the subject are as follows:

ARTICLE 1.

A merchant ship converted into a war ship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

ARTICLE 2.

Merchant ships converted into war ships must bear the external marks which distinguish the war ships of their nationality.

ARTICLE 3.

The commander must be in the service of the state and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

ARTICLE 4.

The crew must be subject to military discipline.

ARTICLE 5.

Eevery merchant ship converted into a warship must observe in its operations the laws and customs of war.

ARTICLE 6.

A belligerent who converts a merchant ship into a warship must, as soon as possible, announce such conversion in the list of warships.

ARTICLE 7.

The provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention.

It is accepted as a general proposition that a belligerent under proper regulations will be allowed to use his resources upon the sea as well as upon the land. The fundamental objection to the use of converted merchant vessels has previously been the lack of government control and responsibility. Such control and responsibility is now secured.

These articles provide that war status will be conceded to merchant vessels only when under state authority, bearing the flag and distinguishing marks of belligerent nationality, subject to the command of a duly commissioned officer, with crew under military discipline, and observing the rules of war.

These articles take the converted merchant vessel out of the category of privateers and thus respect the first clause of the declaration of Paris of 1856 by which "privateering is and remains abolished." This convention might properly have the title, "A Convention to Secure the Observance of the Declaration of Paris in regard to Privateering." The converted merchant vessels become a part of the navy.

This had already been provided for in the Regulations for the Naval Auxiliary Service of the United States in effect April 1, 1907. In Chapter I, 2, of these regulations it is provided that "these vessels shall be governed by the laws of the United States, by the Navy regulations as far as they may be applicable, and by these regulations."

The preamble of the convention is as follows:

> Whereas it is desirable, in view of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected;
>
> Whereas, however, the contracting powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a warship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules.

As the more important naval powers have agreements with the steamship companies under which in time of need

certain vessels may be taken into the public service, the place of conversion is a matter of utmost importance, and this subject by specific declaration remains outside the convention.

In general, a merchant vessel might be converted into a war vessel in a home port, on the high sea, or in a neutral port, and under exceptional circumstances within the jurisdiction of the other belligerent.

To conversion in a home port, followed by prompt notification as provided for in article 6 of the convention, little objection could be raised.

In the exceptional case of conversion within an enemy's jurisdiction there might arise a question of the exercise of good faith if a merchant vessel should forthwith be converted into a war vessel after it had been allowed to take on cargo or make repairs in an enemy's port during the days of grace allowed for departure of enemy vessels at the outbreak of war. It would seem that a regulation should be adopted by which vessels allowed such a privilege should retain their merchant character, at least until converted in a home port.

The main questions arise, however, in regard to conversion on the high seas, which the convention excludes because the powers can not reach an agreement, and conversion within neutral jurisdiction, which the convention does not mention.

The discussion during the Russo-Japanese War in regard to the conversion of the *Smolensk* and *Peterburg* of the Russian volunteer fleet after they had passed the Dardanelles, closed to war vessels, and were upon the open sea showed the necessity of some international understanding in order to avoid friction. There is no provision at present which prevents change of character from time to time from merchant to war ship or vice versa, unless it be article 6 of the convention, which provides that "a belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of war ships." It would seem that to render this article 6 definite there should be an additional clause to the effect that a vessel thus placed in the

list of war ships should retain this status to the end of the war, as some of the delegates contended.

A neutral State has a right to demand that the status of a vessel be not changed from that of a merchant vessel to that of a war vessel in such manner as to render the preservation of neutrality unnecessarily difficult. It is evident that questions as to the observance of neutrality might arise if a merchant vessel should enter a neutral port and load with supplies which would render the vessel of immediate service in war and after taking on such supplies assume a war status. What a war vessel in time of war may do in a neutral port is usually strictly prescribed. It may remain only for a specified period, take on a specified amount of coal, etc. A merchant vessel has almost unlimited freedom so long as it observes ordinary port regulations. If a merchant vessel may change to a war vessel immediately after leaving the neutral port or even within the port, a neutral may unwittingly allow such a vessel to prepare within the neutral jurisdiction to prey on the neutral's own commerce. A neutral port might become practically an enemy's base. Many contingencies might arise which would emphasize the need of the provisions which the seventh Hague convention did not cover though recognized as desirable and considered to some extent by the delegates.

This convention embodies and makes more definite the principles which have been generally followed in practice since 1870, when Germany made her propositions in regard to a voluntary naval force. It regulates somewhat more carefully the use of such vessels after they are enrolled in the public forces. Many questions arose at the Hague conference of 1907 which made impossible the formulation of generally acceptable rules on all points in regard to the conversion of merchant ships into war ships. Some of the delegates were absolutely opposed to conversion except in a home port. While some of the delegates were generally opposed to conversion on the high seas, they wished to make exceptions in favor of merchant vessels which had left national ports before

the outbreak of hostilities and in favor of the conversion of merchant vessels captured from the enemy on the high sea and adapted to warlike use. Some thought that the abolition of capture of private property at sea would lead a belligerent to change a ship from a war status to a merchant status if in danger of capture in order to bring it under the exemption. Great freedom of conversion and reconversion was favored by a few of the delegates. The need that the character of a vessel be clear to a neutral was generally maintained.

Upon the question justly regarded as the most difficult, "the question whether the conversion of a merchant ship into a war ship may take place upon the high seas," the contracting powers have been unable to come to an agreement. As the preamble of the seventh convention states, "the question of the place where such conversion is effected remains outside of the scope of this agreement" and is in no way affected by its rules. Thus, it is evident that while provision is made for the abolition of the evils of privateering, there remains for a later conference the agreement upon such difficult questions as those of conditions under which a converted vessel may be reconverted into a merchant vessel and the place where conversion and reconversion may be allowed. (Wilson: Conversion of Merchant Ships into War Ships, American Journal of International Law, vol. II, p. 271.)

Retransformation, Second Hague Conference, 1907.— The question has been raised at different times why transformation from a war vessel into a merchant vessel is not as legitimate as the reverse. It may be said that in time of peace there would be in general no objection to such transformation, and that in fact it often takes place. The question of retransformation was particularly brought before the Second Hague Conference by the proposition of Dr. Lammasch, of Austria-Hungary, to the effect that—

> La transformation sera permanente pendant toute la durée des hostilités et la retransformation sera interdite.

The Swedish delegate showed that unrestrained transformation and retransformation would lead to grave

abuses. The British delegate shared this opinion. The Japanese delegate proposed that retransformation should not be prohibited, but that the place where it might take place be restricted. (Deuxième Conférence International de la Paix, Tome III, p. 1014.) Finally the question of retransformation was left without any decision.

Attitude of naval powers in 1908.—Before the International Naval Conference of 1908 the States invited to the conference were invited to submit their views upon the question of conversion of merchant vessels into war vessels. The replies to this invitation show a wide divergence of views. In some respects the difference of views seems wider than at the Second Hague Conference in 1907. The range of opinion may be seen from the memoranda presented by several of the States:

GERMANY.

1. La transformation des navires de commerce en bâtiments de guerre, visée par la Convention relative à ce sujet et conclue à La Haye le 18 Octobre, 1907, ne pourra se faire que—

(1) Dans les ports et rades ou dans les eaux territoriales des belligérants;

(2) En pleine mer.

Les navires ainsi transformés ne pourront être retransformés en navires de commerce pendant toute la durée de la guerre. (Proceedings International Naval Conference, Miscellaneous, No. 5 (1909), p. 108.)

The Austro-Hungarian proposition discusses the matter of transformation, and proposes rules somewhat more restrictive than those generally advocated:

La question de savoir s'il est licite de transformer, sur la haute mer, des navires de commerce en bâtiments de guerre, n'a pas été traitée par les auteurs. Dans la pratique, l'unanimité ne s'est pas faite sur la matière. Pour résoudre la question, l'on ne peut donc se baser que sur les aspirations légitimes des intéressés.

L'on ne saurait affirmer que, sur la haute mer, le belligérant pût à son gré disposer de ses navires. Il est vrai que sa souveraineté s'étend sur ces navires. Mais, comme la haute mer est "omnium communis," la souveraineté de chaque État y est limitée par les intérêts des autres Etats.

C'est pourquoi les Etats sont dans leur droit quand ils demandent que la transformation des navires de commerce en bâti-

ments de guerre ne doit être permise que dans des conditions garantissant que le trafic pacifique n'aura à craindre ni la réapparition de corsaires ni d'autres mesures vexatoires. Par conséquent, l'on ne peut ni permettre ni défendre, sans restrictions, la transformation, sur la haute mer, de navires de commerce en bâtiments de guerre.

Pour concilier, en l'espèce, les intérêts contraires, il serait peut-être utile le défendre la retransformation des vaisseaux de guerre en navires marchands. C'est ce que la Délégation austro-hongroise a déjà constaté dans la IV^e^ Commission de la II° Conférence de la Paix. Il est vrai qu'à cette époque, ladite proposition n'a pas recueilli tous les suffrages quoiqu'on ne saurait admettre qu'elle pût être contraire aux intérêts de qui que ce soit.

Si, à l'avenir, cette proposition n'était pas plus favorablement accueillie, l'on devrait—puisque tout le monde doit désirer une solution de la question—rechercher d'autres moyens susceptibles de prémunir les neutres contre les empiètements des belligérants.

Ainsi qu'il appert des termes dans lesquels la question a été posée au programme ("on the high seas"), il importe actuellement de compléter, dans un point essentiel, la Convention relative à la transformation des navires de commerce en bâtiments de guerre et signée à La Haye en 1907. Et, comme il résulte des discussions qui se sont engagées, en cette matière, au sein de ladite Conférence, il ne s'agit point, à proprement parler, d'établir une définition de la notion "vaisseau de guerre," mais plutôt de déterminer les conditions à remplir par les navires transformés pour être admis à exercer le droit de prise contre les neutres. Pour accomplir cette mission d'une manière réelle et efficace, il leur faudrait un armement de quelque importance et une vitesse supérieure à celle que les navires de commerce possèdent en général. En établissant ces deux conditions exigées par la nature même des choses on offrirait aux neutres des garanties précieuses sans léser les intérêts légitimes des belligérants.

Enfin, l'art. 6 de la Convention sus-visée pourrait paraître insuffisant. Si le belligérant n'est obligé qu'a inscrire le navire transformé sur la liste de ses bâtiments de guerre, les neutres—et voilà l'important—n'ont aucune connaissance de la transformation opérée. Pour cela, il faudrait une notification. De même, la retransformation—si, d'une facon générale, elle était déclarée licite, ne fût-ce que dans des ports nationaux—devrait être notifiée.

En résumé, l'on pourrait soumettre la transformation—sans distinguer si elle doit avoir lieu dans des eaux nationales, dans des eaux territoriales occupées par un belligérant, ou sur la haute mer—aux conditions supplémentaires que voici:

1. Un minimum de bouches à feu d'un certain calibre;
2. Un minimum de vitesse;

3. Notification immediate avec indication de l'endroit où la transformation, voire la retransformation, a eu lieu;

4. Désarmement effectif, en cas de retransformation;

5. Mention, dans la notification, des circonstances relatives aux points, 1, 2, et 4;

6. Responsabilité de État pour tous les dommages éprouvés par des États tiers ou leurs ressortissants à la suite d'une contravention contre les règles énumérées ci-dessus. (Ibid., p. 108.)

SPAIN.

Il existe de considérables différences juridiques entre le navire de guerre et le navire de commerce, même si celui-ci arbore le pavillon belligérant. La diversité est caractérisée et définie par les rapports de l'un et de l'autre vaisseau, non seulement avec les autorités de leur pays, mais avec les autorités, les forces et les personnes et propriétés privées de l'ennemi aussi bien que des Puissances neutres. Si une erreur ou simplement une équivoque se produisait à l'égard du caractère du navire, il deviendrait impossible pour les tiers de discerner à qui sont défendues et à qui sont consenties les facultés inhérentes á l'action militaire de l'État. D'autre part, les règles qui empêchment l'equipement d'un vaisseau ou d'une expédition militaire dans un port neutre pourraient résulter inefficaces si le changement de condition du navire sur la haute mer était permis. Chaque navigation, enfin, est réglée et qualifiée par des papiers délivrés dans un port à destination d'un autre. Si l'État lui-même soustrait ses navires aux effets des documents, ceux-ci restent sans valeur. Pour toutes ces raisons la transformation des navires de commerce en navires de guerre en pleine mer doit être déclarée nulle. (Ibid., p. 109.)

FRANCE.

Tous les États jouissant sur un pied d'égalité absolue en haute mer du plein exercice de leur souveraineté à l'égard des navires de leur pavillon, sont, en conséquence, libres de les y soumettre à telles mesures de mobilisation ou transformation militaire qu'il leur convient d'ordonner. (Ibid., p. 109.)

ITALY.

Cette question n'est pas prévue par le droit positif italien.

La Délégation italienne à la deuxième Conférence internationale de la paix a proposé une résolution à cet égard dans les termes suivants:

"Les navires qui quittent les eaux territoriales de leur pays après l'ouverture des hostilitiés ne peuvent changer leur qualité

ni dans la mer libre ni dans les eaux territoriales d'un autre État."—(IV[e] Commission, annexe n. 17.) (Ibid., p. 110.)

JAPAN.

Un navire de commerce ne peut pas être transformé en bâtiment de guerre ou retransformé en navire de commerce par un belligérant, si ce n'est dans un port ou dans des eaux territoriales appartenant au dit belligérant ou à son allié, ou occupées par leurs forces militaires ou navales. (Ibid., p. 110.)

NETHERLANDS.

(1) La transformation d'un navire de commerce en navire de guerre ne peut avoir lieu que dans le territoire ou les eaux territoriales de la Puissance, dont il portera le pavillon.

(2) Un navire de commerce transformé en navire de guerre ne pourra perdre ce caractère avant la fin de la guerre. (Ibid., p. 111.)

RUSSIA.

La transformation d'un navire de commerce en bâtiment de guerre peut avoir lieu, au cours des hostilitiés, dans les eaux territoriales du belligérant ainsi qu'en haute mer. Dans les deux cas, les belligérants sont tenus d'observer les règles prescrites par la convention relative à la transformation des navires de commerce en bâtiments de guerre signée a La Haye le 18 Octobre, 1907. (Ibid., p. 111.)

Such differences of view show that the question upon which no solution had been reached at The Hague in 1907, was even after the discussion at London far from settlement. Indeed the divergency of view at the International Naval Conference in 1908 was so wide that it was not possible to formulate a satisfactory basis for discussion. The discussion at that conference of the general subject of conversion of merchant vessels into war vessels did not bring about uniformity of opinion.

Discussion in 1908–9.—The discussion at the latest international conference before which the conversion of private vessels into war vessels is valuable as evidence of the problems which must be solved before agreement is reached.

It was natural that the experience of Russia in the Russo-Japanese War of 1904–5 should cause that State to take a lively interest in the subject. The Russian delegate to the International Naval Conference of 1908–9 set forth the Russian position at length.

Dans l'opinion de la Délégation russe, un *seul* point pourrait se dégager avec certitude de l'examen des différents mémorandums en ce qui concerne la transformation des navires de commerce en bâtiments de guerre en haute mer. C'est, notamment, l'observation qui se trouve déjà formulée dans l'"Exposé des Vues" préparé par les soins du Government Britannique, à savoir, que, dans cette question, "il n'existe actuellement aucun principe commun reconnu de tous." Aussi voyons-nous des mémorandums qui nient purement et simplement le droit du belligérant de transformer en haute mer ses navires de commerce en bâtiments de guerre, tandis que d'autres le reconnaissent expressément. Le Gouvernement Russe partage cette dernière manière de voir, ensemble avec les Gouvernements d'Allemagne et de France, et la Délégation Russe appelle l'attention toute particulière de la Conférence sur ce fait que, si le point de vue de ces trois Puissances représente, paraît-il, l'opinion de la minorité de la Conférence, cette minorité n'en défend pas moins un principe logiquement et juridiquement beaucoup plus solide que celui de la majorité. Car il paraît tout à fait impossible de prouver par des arguments d'ordre juridique, pour quelles raisons un État souverain, exerçant incontestablement à l'égard de ses navires en haute mer sa pleine souveraineté dans toute l'étendue des droits qu'il exerce sur son propre territoire, serait privé de la faculté de les transformer, le cas échéant, en bâtiments de guerre. Et si, pour citer un exemple plus ou moins analogue, invoqué en 1907 à La Haye par le Colonel Ovtchinnikow, personne ne s'étonne de voir un navire de commerce *ennemi*, capturé, se transformer pendant qu'il est conduit en qualité de prise et sous pavillon du capteur, en bâtiment de guerre, pourquoi ne devrait-on pas admettre, a *fortiori*, au profit du belligérant le même droit de transformation à l'égard de ses *propres* navires de commerce?

Il est vrai que des intérêts fort sérieux des neutres y sont en jeu, et que c'est surtout la crainte des abus possibles qui fait protester contre ce droit de transformation en haute mer. Mais des règles déjà adoptées en cette matière à la Haye en 1907—qui assurent tant la publicité de la transformation que la complète militarisation du navire—nous semblent constituer une sérieuse garantie contre ces abus. Aussi, le mémorandum russe, dont je défends intégralement la proposition, ne proclame-t-il le principe de la transformation en haute mer que sous la réserve

expresse de l'observation des règles susmentionnéses prescrites par la Convention y relative du 18 octobre, 1907.—(Proceedings of the International Naval Conference, Parliamentary Papers, Miscellaneous, No. 5 (1909), p. 263.)

The German opinion was in many respects similar to that of Russia. The place of conversion is not regarded as a matter of much importance.

Je ne puis que m'associer purement et simplement aux paroles de M. le Délégué plénipotentiaire de Russie. Après un examen approfondi et répété de la question, nous sommes toujours convaincus que la militarisation des navires de commerce en haute mer n'est pas interdite par le droit existant et qu'il n'y a aucune raison qui justifie son interdiction à l'avenir. Dans la lecture des Mémorandums des différentes Puissances nous n'avons puisé aucun élément qui ait ébranlé cette opinion.

Il est vrai que le Mémorandum britannique fait valoir les dangers qu'il y aurait pour le commerce neutre s'il était permis d'exercer le droit de visite à l'aide de navires que les neutres croiraient être de pacifiques navires de commerce et qui auraient été soudainement et sans avertissement convertis en bâtiments de guerre, peut-être dans le voisinage immédiat de navires qu'ils désirent arrêter et visiter. Je dois, cependant, avouer que je ne comprends pas pourquoi la militarisation en pleine mer devrait être regardée comme une nouvelle restriction à la sécurité du commerce ou à la liberté de la navigation. Les navires transformés en pleine mer n'exerceront d'autres droits et n'imposeront au commerce d'autres restrictions que les navires que sont transformes dans les ports nationaux ou que les vaisseaux de combat; si leur caractère militaire n'est pas connu d'avance ou même si ce caractère n'est revêtu que dans le voisinage d'un navire neutre, cela ne semble point aggraver la situation de la navigation légitime et inoffensive. Il va de soi qu'avec l'augmentation des bâtiments de guerre le belligérant est mieux en mesure de surveiller et de réprimer le commerce de contrebande, et il n'y a pas de doute que les navires qui se livrent à cette navigation prohibée en pâtiront. Mais le commerce pacifique n'a d'autres intérêts que ceux qui sont sauvegardés par la Convention relative à la transformation qui a été élaborée à La Haye. Dès que la loyauté et la réalité de la transformation sont garanties que le navire transformé observe les lois et coutumes de la guerre et que son équipage est soumis à la discipline militaire, le lieu de la transformation ne parait être d'aucune importance. (Ibid., p. 264.)

The British point of view was presented in a comprehensive exposé on January 15, 1909. This exposé admitted that there was no existing law upon the subject

of conversion, and maintained that unrestricted conversion would impair the rights of neutrals and might differ little from privateering. Such vessels might retain an appearance of private vessels till exercising some belligerent right toward a neutral. Such vessels might abuse neutral privileges as said in the British exposé:

La vue de la Délégation Britannique se trouve résumée au Chapitre 6 du Mémorandum britannique, aux pages 93 et 204 du livre rouge, et MM. les membres de la Conférence n'ignorent certainement pas les arguments qu'ont fait valoir à l'appui de cette vue les Représentants de la Grande-Bretagne à la Deuxième Conférence de la Paix. La Délégation Britannique n'émet pas la suggestion qu'il existe à ce sujet une règle générale quelconque du droit international, que ce soit à l'appui de sa propre vue ou de celle de ces Puissances qui considèrent la transformation en pleine mer comme permise, mais elle maintient l'opinion que, puisque le principe de la transformation en pleine mer des navires de commerce d'un belligérant en vaisseaux de guerre n'est pas reconnu par une règle existante du droit international, l'admission de cette transformation comme régulière se trouve en contradiction avec les droits des neutres et avec les principes de la courtoisie internationale.

Par la Déclaration de Paris les signataires de cet accord ont déclaré la course abolie, et les principes de cette Déclaration ont été depuis lors mis à exécution par des Puissances qui ne l'ont pas signée. Je n'estime pas que les Délégués d'aucune Puissance représentée ici soient disposés à défendre la course comme conforme aux sentiments modernes et aux principes qui gouverneront la guerre maritime à l'avenir.

Au sens de la Délégation Britannique, l'exercice de la faculté de transformer les navires de commerce en bâtiments de guerre à tout moment et en tout endroit, en dehors des eaux territoriales neutres, pourrait, bien qu'il se distingue de la course, amener des conséquences encore plus nuisibles que celle-ci au point de vue du commerce neutre pacifique. Du temps de l'existence de la course, les navires de commerce neutres se rendaient bien compte des dangers qu'ils couraient d'être visités et saisis par les vaisseaux de la course aussi bien que par les bâtiments de guerre des belligérants, mais si la faculté de la transformation s'exerçait de la façon que l'on voudrait autoriser, les navires neutres se trouveraient exposés à l'arrêt, à la visite, et il se peut même à la saisie par des vaisseaux connus peut-être par les neutres pour avoir été des navires de commerce pacifiques faisant un service régulier. De tels navires transformés n'auraient aucune obligation de déclarer leur qualité de vaisseaux belligérants jusqu'à ce que le neutre leur eût permis de l'accoster et de l'arrêter. Il est

même permis de se poser le cas où ils navigueraient en compagnie de navires de commerce semblables jusqu'au moment qu'ils jugeraient opportun pour se transformer en vaisseaux de guerre et pour faire valoir leur droit de visite et de saisie. De tels vaisseaux pourraient se trouver dans des ports neutres par toute l'étendue du monde et seraient ainsi en mesure d'y guetter le départ de navires neutres qu'ils pourraient soupçonner de porter de la contrebande, d'accompagner hors du port, ou de poursuivre immédiatement, ces navires neutres et, transformés tout de suite après leur départ, de faire valoir leur qualité de vaisseaux de guerre belligérants. Encore, bien qu'un tel navire pût se trouver dans l'impossibilité d'atteindre son port d'origine comme navire de commerce sans s'exposer au risque imminent de la capture par un belligérant, il lui serait toutefois possible d'atteindre une route commerciale quelconque où il pourrait exercer ses droits belligérants en faisant tout simplement voile d'un port neutre à un autre en guise de navire de commerce jusqu'au moment où il fût arrivé à l'endroit opportun pour entreprendre ses opérations guerrières. Il pourrait, sous pavillon de commerce, demeurer aussi longtemps qu'il voudrait dans n'importe quel port neutre, faire sans restrictions les provisions et le charbon, se soustraire à la capture en se réfugiant dans un port neutre jusqu'à ce que le danger fût écarté, et ainsi, bien que son voyage entier fût entrepris dans le but de faire fonction de vaisseau belligérant, il ne serait soumis à aucune des règles de la Convention applicables aux vaisseaux belligérants dans les ports neutres, c'est-à-dire, il emploierait effectivement les ports neutres comme base de ses opérations guerrières subséquentes. Il me paraît évident que des neutres puissants n'admettraient point sans protestation la capture de leurs navires par des vaisseaux de guerre ainsi constitués, et une semblable procédure comporterait donc le risque sérieux d'étendre le théatre de la guerre, éventualité laquelle les deux Conférences de la Paix ont eu assurément pour objet d'éviter, comme c'est aussi le cas pour la Conférence actuelle.

Cette pratique pourrait également rendre difficile et délicate au plus haut degré la situation des neutres de puissance inférieure dont les ports avaient hébergé de tels vaisseaux. Tandis que l'un des belligérants revendiquerait pour ses navires, jusqu'au moment même de leur transformation, le traitement de navires de commerce, l'autre ne manquerait pas de demander aux neutres de refuser à ceux-ci le droit de se servir de ports neutres dans le but indiqué, de sorte que, à n'importe laquelle des deux Puissances le neutre finît par céder, il risquerait de se trouver en guerre avec l'autre.

Ces considérations offrent, à l'avis de la Délegation Britannique, des raisons importants d'exclure le droit de la transformation

en mer, ou du moins d'empêcher une telle transformation de s'effectuer avant qu'un délai très considérable ne soit écoulé du moment où le vaisseau ait quitté son dernier port neutre. Cependant, une telle provision ne diminuerait qu'à un degré insignifiant les inconvénients de la transformation en pleine mer, et la Délégation Britannique estime que, si en effet un tel principe peut être admis de quelque manière que ce soit, on devrait lui imposer telles restrictions qui offriraient des garanties solides contre les surprises et contre ce que l'on pourrait même qualifier de pièges tendus au commerce neutre. On pourrait peut-être établir les garanties requises au moyen d'un avertissement de nature satisfaisante portant que certains navires de commerce appartenant à un belligérant étaient destinés, au moment de l'ouverture des hostilités ou après, à être transformés en vaisseaux de guerre si le propriétaire belligérant jugeait nécessaire une telle mesure. Pour être de quelque utilité, un tel avertissement devrait être publié et porté à la connaissance des Puissances neutres au moyen d'une notification ou autrement avant le commencement de la guerre, et de tels navires devraient être portés sur la liste de la marine de guerre du propriétaire belligérant. La notification après transformation effectuée n'aurait qu'une valeur relative, et probablement minime, au point de vue des neutres, puisqu'elle ne saurait atteindre des navires déjà en mer ou faisant escale dans des ports dépourvus de communication télégraphique.

Il est évident que les États neutres dans les ports desquels s'étaient réfugiés des navires de cette catégorie ne seraient guère justifiés à accorder sans restrictions à de semblables vaisseaux de guerre *in posse* la pleine mesure d'hospitalité habituelle pour le cas des navires de commerce de bonne foi appartenant à un belligérant, mais la nature exacte des limitations à imposer à la visite aux ports neutres de ces vaisseaux changerait évidemment avec les circonstances. Dans le cas où l'État belligérant n'aurait aucune intention de profiter de sa faculté de transformer un navire quelconque, il pourrait se plaindre avec justice de l'imposition par le neutre de toute restriction en ce qui concerne la quantité de charbon à fournir à ce navire, la durée de son séjour, &c., comme d'un acte sans justification et même d'hostilité. Si, par contre, de telles restrictions ne devaient jamais s'imposer, il y aurait grand danger que l'on n'abusât de l'hospitalité du neutre. Une solution satisfaisante de cette difficulté n'est point facile à trouver.

Le mémorandum austro-hongrois a suggéré d'autres conditions à imposer qui pourraient légalement être prises en considération, mais dans la vue de la Délégation Britannique la notification offrirait le seul avertissement pratique et suffisant.

La Délégation Britannique n'est pas en mesure, sans instructions ultérieures, de déclarer d'une manière définitive que ces conditions ou d'autres lui seraient acceptables, mais quelque atténuation de la prétention mise en avant serait en tout cas nécessaire pour mettre le Gouvernement Britannique à même de modifier l'opinion qu'il ne devrait être permis aux navires de commerce de se transformer en bâtiments de guerre que dans les ports ou dans les eaux territoriales du belligérant ou de son allié. Il est prêt cependant à tenir compte, dans un esprit de conciliation, de toute proposition pouvant avoir pour effet de sauvegarder le commerce neutre contre les dangers que j'ai cités. (Ibid., p. 264.)

The Italian delegation submitted and maintained the same proposition which Italy had supported at the Second Hague Conference.

La proposition que la Délégation italienne a l'honneur de soumettre à la Conférence reproduit exactement la proposition formulée à ce sujet par la Délégation d'Italie à la Deuxième Conférence de la Paix, savoir :—

"Les navires qui quittent les eaux territoriales de leur pays après l'ouverture des hostilités ne peuvent changer leur qualité ni dans la mer libre, ni dans les eaux territoriales d'un autre État."

La question est bien délicate et difficile. Il s'agit en effet de concilier la règle qui paraît découler, au point de vue théorique, des principes concernant le libre exercice du droit de souveraineté en dehors des eaux territoriales neutres, avec des difficultés pratiques très sérieuses, concernant la bonne foi et la sécurité du commerce des neutres. Notre proposition est conçue dans l'esprit de sauvegarder, autant que possible, la liberté des belligérants, avec les intérêts et la neutralité des pays tiers.

Un navire qui, au moment de l'ouverture des hostilités, se trouve dans les eaux territoriales de son pays, peut être transformé, dans les eaux mêmes, en bâtiment de guerre: la faculté qu'on lui accorderait de se transformer ensuite, en pleine mer, après avoir joui peut-être, dans des ports neutres, des privilèges propres des navires de commerce, pour faciliter sa transformation ultérieure, pourrait impliquer, dans bien des cas, un abus de ces privilèges et une certaine atteinte à la bonne foi des neutres. La restriction que, pour ces motifs, et d'autres encore, il paraît utile d'apporter aux droits souverains de l'État belligérant vis-à-vis de ses navires marchands, semblerait, cependant, excessive et ne serait pas, d'ailleurs, également justifiée, dans le cas où le navire en question eût quitté les eaux territoriales de son pays avant la guerre. Il ne pourrait pas, en effet, être soupçonné de mauvaise foi vis-à-vis des neutres, et il serait exorbitant de le forcer à rentrer (peut-être par un long voyage) dans un port national pour y opérer une transformation qui pût le mettre en

mesure de se défendre contre les navires adversaires, et de porter son concours aux forces armées de son pays. Il suffit de déclarer, dans ce cas, que la transformation ne pourra jamais avoir lieu dans les eaux territoriales d'un pays neutre. Le principe de la liberté de transformation en pleine mer garderait, dans ce cas, eu égard à la situation spéciale des navires en question, toute sa valeur. (Ibid., p. 266.)

The Austro-Hungarian position, while maintaining the freedom of the sea, recognized that the doctrine of freedom for each State must recognize the rights of others, and proposed to prohibit retransformation during the period of the war and to require ample notice in case of transformation.

L'on ne saurait contester, de l'avis de mon Gouvernement, que les États aient, en principe, plein droit de transformer leurs navires de commerce en haute mer. Mais comme la pleine mer est *omnium communis*, l'exercise de la souveraineté de chaque État y est limité par les intérêts légitimes des autres Puissances.

Aussi avons-nous demandé dans notre mémoire que la transformation ne soit permise que dans des conditions garantissant le commerce pacifique contre des mesures vexatoires ou dangereuses. Nous avons proposé, dans cet ordre d'idées, de subordonner la transformation à deux conditions principales, savoir:

1. A l'interdiction de la retransformation durant la guerre des navires militarisés;

2. A la notification en temps utile de la transformation. (Ibid., p. 267.)

The German plenipotentiary, referring to the Italian and Austrian propositions, said:

Il faut rendre hommage à l'esprit de conciliation qui a amené M. le Délégué Plénipotentiaire d'Italie à faire la proposition dont il vient de nous donner les motifs. Je ne sais cependant s'il ne se trompe pas au point de vue pratique en supposant que les navires qui au moment de l'ouverture des hostilités se trouvent dans leurs eaux nationales seront toujours à même d'y prendre d'avance leurs dispositions militaires. Les marins parmi nous nous diront peut-être qu'au cours de la guerre la nécessité peut se présenter de militariser un navire dont on ne croyait pas avoir besoin au début, et qu'on voulait laisser continuer sa navigation pacifique.

Avec la règle proposée par M. Fusinato une Puissance serait forcée ou à retenir dans ses ports tout navire susceptible de transformation par crainte de se priver d'une chance peut-être éloignée de s'en servir comme bâtiment de guerre, ou à renoncer

à la transformation de ces navires qu'elle aurait une fois laissée partir de ces ports.

Au point de vue juridique, je ne crois pas qu'on puisse établir une distinction entre les navires qui, au début des hostilités, sont encore dans leurs ports nationaux et ceux qui à ce moment se trouvent dans des ports neutres. Il me semble que les raisons qu'on peut alléguer pour la liberté de la transformation des uns sont aussi applicables à celle des autres.

En ce qui concerne les propositions de son Excellence le Délégué Plénipotentiaire d'Autriche-Hongrie, qui tendent à rendre obligatoire la notification de toute transformation et à interdire la retransformation pendant la durée de la guerre, je crois qu'elles méritent une attention toute particulière. J'aime à espérer que sur cette base on arrivera à une solution qui donne satisfaction à tous les intéressés. (Ibid., p. 267.)

The Netherlands delegation indorsed the position taken by the British delegation.

The American delegation submitted the following brief regulation:

"En temps de guerre, aucun navire privé ne sera transformé en bâtiment de guerre, à moins d'être commandé par un officier régulièrement commissionné et muni d'un équipage soumis à la loi et à la discipline militaires, et aucune transformation de ce genre ne pourra avoir lieu sauf dans les eaux territoriales de l'État propriétaire du navire, ou dans les eaux territoriales sur lesquelles il exerce, par ses forces militaires, un contrôle effectif." (Ibid., p. 268.)

Result of discussion of 1908–9.—The committee to which the subject of conversion was referred gave careful consideration to the matter, but acknowledged in their report to the conference that they had failed in trying to reach an agreement. After reviewing the discussion upon the question, the report says:

Tous admettaient la faculté de transformer pendant la guerre un navire de commerce en bâtiment de guerre, mais se séparaient quand il s'agissait de déterminer le lieu où cette transformation était possible.

Certains distinguaient entre les navires quittant les eaux territoriales de leurs pays après l'ouverture des hostilités et ceux qui les avaient quittées auparavant. Ces derniers auraient pu se transformer en pleine mer, tandis que les premiers n'auraient pu le faire que dans un port de leur pays. On tenait ainsi compte, dans une certaine mesure, de la situation dans laquelle pouvait se trouver un pays qui, lors de l'ouverture des hostilités, aurait des

navires transformables naviguant dans des régions éloignées de ses ports nationaux.

Quelques-uns de ceux qui niaient, en principe, la faculté d'opérer une transformation en pleine mer et qui invoquaient principalement en ce sens l'intérêt pour les neutres de connaître les navires ayant les droits de belligérant, admettaient cette faculté dans la mesure où elle aurait été compatible avec cet intérêt; pour cela, ils exigeaient une notification, faite en temps de paix, des navires aptes à être transformés, à quoi l'on objectait qu'un Gouvernement ne sait pas toujours à l'avance quels seront ses besoins pendant la guerre, que cela dépend des circonstances, de l'adversaire notamment, enfin qu'une pareille notification pourrait renseigner sur le plan de mobilisation.

Ceux qui affirmaient le droit de transformation, voulant tenir compte des considérations invoquées en sens contraire, exigeaient que le fait de la transformation fût notifié le plus tôt possible aux Gouvernements neutres, sans que, du reste, le navire transformé dût attendre cette notification pour exercer ses droits de belligérant; il suffisait pour cela qu'il eût satisfait aux conditions exigées par la Convention du 18 octobre, 1907.

Une opinion intermédiare s'est fait jour; elle était inspirée par le désir de donner une certaine satisfaction aux deux opinions extrêmes, de tenir compte de l'intérêt des neutres sans sacrifier celui des belligérants. La transformation en haute mer aurait été possible à la condition qu'elle fût portée à la connaissance des neutres avant l'exercice des droits de guerre par les bâtiments transformés. Cette opinion a soulevé des objections de nature diverse, d'ordre pratique notamment, et cela de la part de ceux qui professaient les deux opinions opposées. C'est le rejet de cette opinion qui a déterminé la conviction que, pour le moment, il n'y avait pas chance d'arriver à une entente, et que l'on devait se borner à cette constatation.

Une question qui se rattache à la précédente et sur laquelle il a pu paraître à un moment possible d'arrêter une résolution, est celle de la *retransformation*. D'après une proposition, "les navires de commerce transformés en bâtiments de guerre ne pourront être transformés en navires de commerce pendant toute la durée de la guerre." La règle était absolue et ne distinguait pas suivant le lieu où pourrait s'opérer la retransformation; elle était inspirée par la pensée que cette transformation aurait toujours des inconvénients, produirait des surprises et prêterait à de véritables fraudes. L'unanimité n'ayant pu être obtenue pour cette proposition, il s'en produisit une qui était subsidiaire: "la transformation en pleine mer d'un bâtiment de guerre en navire marchand est interdite pendant la guerre." On avait en vue la situation d'un bâtiment de guerre (ordinairement un navire de commerce récemment transformé) dépouillant son caractère pour

pouvoir librement se ravitailler ou se réparer dans un port neutre, sans subir les restrictions imposées aux bâtiments de guerre. La position de l'État neutre entre les deux belligérants ne sera-t-elle pas délicate et ne s'exposera-t-il pas à des reproches, qu'il traite en navire de commerce ou en bâtiment de guerre le bâtiment récemment transformé? L'accord se serait peut-être fait sur cette proposition, mais il a semblé qu'il était bien difficile de s'attacher à ce côté secondaire d'une question qu'on ne pouvait songer à régler dans son ensemble. C'est la raison déterminante du rejet de toute proposition.

Pour être complet, je mentionnerai une proposition qui, partant de la possibilité d'une retransformation, voulait au moins en diminuer les inconvénients au moyen d'une certaine publicité: "la retransformation d'un navire marchand en bâtiment de guerre, dans le cas où ce navire a déjà une fois changé de caractère pendant la guerre, doit être communiquée aux différents Gouvernements neutres au moins quinze jours d'avance."

La conclusion de ce rapport est donc purement négative, puisque aucune proposition n'a pu être admise. Il en résulte que la question reste entière. (Ibid., p. 340.)

British view in 1908.—In a preparatory memorandum setting forth the British view upon the points enumerated in the program of the international naval conference in 1908, the statement in regard to conversion of merchant vessels into warships on the high seas was as follows:

No general practice of nations has prevailed in the past on this point from which any principles can be deduced and formulated as the established rules of international law. So far as can be ascertained there are no precedents on the subject.

The question is regarded by His Majesty's Government as one to be decided by reference to the rights of neutrals. Resistance on the part of a neutral merchant vessel to the exercise of the admitted belligerent right of visit and search, involving as it does the possible condemnation of the vessel as good prize, is so serious a matter for the neutral that it is essential that there should be no possibility of doubt as to the ships that are entitled to exercise this right. It is submitted that the true rule to be deduced from the principles which govern the relation between belligerents and neutrals is that the exercise of the right to visit and bring in neutral merchant vessels is strictly limited to ships being, and known to be, public ships of the belligerent fighting fleet flying the pendant. It would be a grave extension of that right if it were held to be permissible to exercise those powers by means of vessels, believed by neutrals to be peaceful

merchant vessels, suddenly and without warning converted into ships of war, possibly in the immediate neighborhood of vessels which they desire to stop and search. Any further limitation to the security of peaceful commerce or of the freedom of neutral vessels to navigate the seas is opposed to the general interests of nations, while the exercise of belligerent force against neutrals in the manner indicated above would almost inevitably lead to friction, with the attendant danger of bringing other nations into the arena of war. The somewhat arbitrary powers accorded to belligerents as against neutrals for the protection of the vital interests of the former should not, it is submitted, be increased, by according sanction to proceedings which, however, they may be argumentatively sustained, are entirely novel and without the support of any existing principles of international law. His Majesty's Government, therefore, regard it as of great importance to neutrals that units of the fighting force of a belligerent should not be created except within the jurisdiction of that power. (Correspondence and Documents, International Naval Conference, Miscellaneous, No. 4 (1909), p. 10.)

Instructions to British delegates, 1908.—In the instructions to the British delegates to the international naval conference in 1908, Sir Edward Grey said:

The condition under which merchant ships may be converted into warships were much debated at the second peace conference, and on a number of points an agreement was reached, which was finally embodied in one of the conventions annexed to the final act of the conference. In regard to one important point, however, namely, as to whether such conversion could be legally effected on the high seas, it was found impossible to arrive at any understanding. The preamble of the convention referred to accordingly recites that:

"Whereas the contracting powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a warship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement, and is in no way affected by the following rules. * * *"

In the presence of this clearly recorded divergence of views it is not possible to expect that the forthcoming conference could bring about agreement as to the existing law, but His Majesty's Government earnestly hope that means will be found to frame a common rule to which the principal naval powers will bind themselves to conform in future. Such a rule must obviously be in the nature of a compromise, and it would have to be established by way of a convention. Apart from the important question of principle involved, there are two practical considerations which

have chiefly weighed with His Majesty's Government in refusing to recognize the right to convert merchant vessels into ships of war on the high seas. One is the facility which such a right would give to the captain of a merchant vessel qualified to act as a warship, to seize enemy or neutral ships without warning. The other is that enemy vessels under the mercantile flag, but suitable for conversion, would be able, as merchantmen, to claim and obtain in neutral ports all the hospitality and privileges which would, under the accepted rules of naval warfare, be denied to them if they were warships. Availing herself of these advantages, such a vessel, found in distant waters after the outbreak of hostilities, would be enabled to pass from one neutral port to another until she reached the particular point in her voyage where she might most conveniently be converted into a commerce destroyer. These difficulties might be met by restricting the right of conversion on the high seas to the case of vessels which had previously been specifically and publicly designated by the respective Governments as suitable for the purpose and borne on their navy lists; and by subjecting such vessels, while in neutral ports, to the same treatment as belligerent men-of-war. But any other suggestions which may be made in the desired direction, His Majesty's Government will be ready to examine sympathetically. (Correspondence and Documents, International Naval Conference, Miscellaneous, No. 4 (1909), p. 31.)

Report of British delegates to international naval conference.—The report of the British delegates to the international naval conference shows that the question of conversion of merchant vessels into war vessels was not brought to a satisfactory conclusion:

The one subject of the programme which has found no mention in the declaration is the conversion of merchant-vessels into men-of-war on the high seas. The question is one of those which had been left unsolved by the second Peace Conference, and so decided was the division of opinion subsequently revealed by the memoranda exchanged by the several Governments before the meeting of the present Naval Conference that it had been found impossible to state, in the shape even of a mere Basis of Discussion, an underlying general principle commonly accepted. In our instructions the hope was nevertheless expressed that some means might be found of reconciling the opposing views and to unite on the basis of a compromise, for which we were allowed a fairly wide discretion. We regret, however, that in this instance all our efforts in bringing about an understanding were unsuccessful. We did not fail to put forward the arguments which, in the view of His Majesty's Government, militate against the recognition of an unrestricted right of conversion on the high seas, and we

endeavored in vain to obtain, in return for a recognition of such right subject to proper limitation, some guarantees against the abuses to which it appears to be obviously liable. We were met with a refusal to make any concessions or to abate one jot from the claim to the absolutely unfettered exercise of the right, which its advocates vindicate as a rule forming part of the existing law of nations. In these circumstances we felt that we had no option but to decline to admit the right, and the result is that the question remains an open one. (Correspondence and Documents, International Naval Conference, Miscellaneous, No. 4 (1909), p. 101.)

Opinion in England.—The fact that the International Naval Conference of 1908–9 was unable to reach an agreement on the question of conversion was the cause of many remarks at the time when the naval prize bill involving matters of war on the sea was before the British Parliament. Comments on the same subject appeared elsewhere. The opinions expressed by commercial bodies and other organizations show great diversity. Frequently petitions to the foreign office requested the rejection of the Declaration of London on the ground that the regulation of the conversion of private vessels into war vessels was not included. One of the ablest of these petitions of protest is that of the London Chamber of Commerce of November 11, 1910, which, among other reasons, states:

That the absence of any provision in the declaration for preventing the conversion of merchant vessels into commerce destroyers on the high seas constitute a valid reason for praying His Majesty's Government to decline to ratify the declaration or to proceed with the naval prize bill. (Correspondence Respecting the Declaration of London, Miscellaneous, No. 8 (1911), p. 14.)

In reply to this objection on the part of other commercial bodies, the foreign office had said:

Sir Edward Grey regrets equally with the chamber of commerce that it was not found possible to come to any arrangement on this important question, but, as stated, on page 101 of the Blue Book, the division of opinion between the powers represented at the conference was so decided that it was not possible to state, even in the shape of a basis of discussion, an underlying general principle commonly accepted. In these circumstances, it can hardly be disputed that the course adopted by this country—

namely, refusal to admit the right claimed, the question thus remaining an open one—was the best which could be followed.

The chamber of commerce no doubt realizes that by the omission of this subject from the declaration no change is made in the existing position, and this being the case, the failure to come to an arrangement on this point would not justify the loss of the advantages which Sir E. Grey considers accrue to this country under the provisions of the declaration. (Ibid, No. 4 (1910), p. 8.)

A vote favorable to the naval prize bill was passed in the British House of Commons, but was not passed by the House of Lords; consequently the matter remains for the time being unsettled.

Of the discussion in Great Britain, Norman Bentwich, who has given particular consideration to the declaration, says:

As there appears to be some confusion on the point in the public mind, it may be as well to state that England's objection is not to the conversion of merchantmen in general—we propose to use a number of our own liners for naval purposes in case of war—but to their conversion on the high seas. Most of the Continental Powers, possessing as they do few ports outside Europe, claim a right to convert ships in their volunteer navy whenever and wherever they choose. England, on the other hand, who, through her possession of naval stations in every sea, is in a stronger position, claims that the conversion must not take place after the opening of hostilities on the high seas, but only within the national jurisdiction. The Continental demand undoubtedly opens the way to grave abuses. The "sort of warship" is able as a merchantman before conversion to obtain in a neutral port the hospitality and often the necessary supplies for her new career, then at a favorable moment to take out her armament, run up the naval flag, and swoop down on any merchantman, enemy or neutral, whom she may meet; and, later it may be, when fleeing from the enemy's cruisers, to resume her peaceful character and seek the shelter of a neutral port. The Conference was not unwilling to pass a rule that reconversion on the high seas to mercantile character is forbidden during the war; but as agreement on the main question was not attainable, the whole subject was, in the end, left open.

It has been urged by several leading Chambers of Commerce in this country that the failure to secure the acceptance of our standpoint at the Conference should be made a ground for not ratifying the Declaration; but this seems illogical. The Declaration does not in any way prejudice our position in the matter; we are free to protest against any belligerent who adopts the

practice in the future. But, it is said, the failure of The Hague and London Conferences to come to an agreement upon the subject shows that the Continental Powers intend, in case of war, to enforce their claim to convert merchantmen on the high seas. Very possibly. But they will do the same whether or not the declaration is ratified, and our ratification will not tie our hands in the least, while The Hague convention explicitly reserves our right of action. (Bentwich, Declaration of London, p. 13.)

Neutral obligations.—A neutral State is under certain obligations to prevent acts which might be construed as failure to observe neutrality. The general statement on this subject is according to the Thirteenth Hague Convention of 1907:

ART. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of every vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted entirely or in part for use in war. (Convention Concerning the Rights and Duties of Neutral Powers in Maritime War.)

The same convention provides:

ART. 13. If a power which has been informed of the outbreak of hostilities learns that a belligerent ship of war is in one of its ports or roadsteads or in its territorial waters, it must notify the said ship to depart within 24 hours or within the time prescribed by the local regulations.

ART. 18. Belligerent ships of war can not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament or for completing their crews.

ART. 24. If notwithstanding the notification of the neutral authorities, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

From the above provisions it is evident that responsibility may rest upon a neutral to prevent the departure of a vessel which there is reason to believe is intended to cruise against a power with which the neutral is at

peace. In absence of provisions to the contrary the period during which a ship of war may remain is 24 hours. The ship of war is not to make use of the neutral port for increasing its supply of war material. The neutral may intern a vessel which does not conform to its regulations in regard to sojourn. There is a comprehensive article relating to the whole of the thirteenth convention which states:

ART. 25. A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles in its ports or roadsteads or in its waters.

While the belligerent is by this convention under obligation to respect the neutrality of States which are not parties to the war, the neutral States are under obligation to prevent the abuse of their jurisdiction.

Uncertainty as to vessel's character.—At the present time, while the convention concerning the conversion of merchant ships into war ships regulates conversion to some degree among States which have become parties to it, yet there are important respects in which the convention fails. The place of conversion and the matter of reconversion particularly remain open.

These uncertainties make the position of the neutral one of difficulty. If the neutral State does not use "due diligence" to prevent fitting out and arming, the neutral State may become liable for its neglect. On the other hand the—

Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a nonfulfilment of their neutrality. (Convention, Rights and Duties of Neutral Powers in Maritime War, art. 1.)

The neutral State would naturally be reluctant to intimate to a belligerent that the belligerent was not observing his obligations under this convention. The temptation to pass beyond the rights permitted under the convention would, however, be strong in case of a private vessel which was about to be transformed into a vessel of

war. A bona fide private vessel would not be subject to the limitations on period of sojourn and on character of goods which it might take on board which would apply to a ship of war. Conversion from a private to a ship of war would, according to accepted rulings, also affect the neutral goods on the converted vessel. Neutral goods on board a vessel of war would under the rulings of British prize courts have been regarded as liable to capture. The American decisions have in some cases been more lenient (The *Nereide*, 9 Cranch; Sup. Ct. Repts., p. 388.) It is probable that neutral goods placed, in good faith as to the private character, on board an enemy vessel would not be subjected to the extreme penalty of confiscation if the vessel should be transformed into a ship of war.

The neutral merchant would seem to be entitled to some means by which knowledge as to the probable character of a vessel for a voyage may be obtained. The neutral State would be much more justified in seeking such information as would make it free from accusation of neglect to fulfill its obligations.

Résumé.—The commander has reason to believe that the *Robin*, which is taking on supplies in the nature of contraband, is to be transformed into a war vessel. If the *Robin* is to be transformed the opportunity to take war supplies in a neutral port and the further privilege of remaining in the port unrestrained by the usual 24-hour rule gives the *Robin* an advantage over a ship of war of State D though the *Robin* will shortly assume that character. The commander of the United States cruiser is therefore justified in requesting that the *Robin* be interned or otherwise restrained.

As the neutral State F would be liable for failure to observe strict neutrality if it did not investigate such a claim, it would be expedient for State F to take such action as may relieve it of responsibility. If it be found that the vessel may be converted, the neutral State may take the necessary measures to remove grounds for claims of indemnity. This may be done by placing the vessel under obligation to maintain its private character

till it reaches a port within the jurisdiction of belligerent State D. If such a pledge can not be secured, there would be ground for restraint or internment or such other action as would secure neutral State F against liability for neglect to use due diligence.

SOLUTION.

The action of the commander of the cruiser of the United States is warranted.

Neutral State F should take such action as would maintain its neutrality by obliging the *Robin* to give a guaranty that it would not change its private character till it reached a port under the jurisdiction of its own flag or a port under jurisdiction of an ally; or neutral State F may maintain its neutrality by other means of restraint even by internment if necessary.

INDEX.